Supreme Court, U.S.
FILED

93 1974 JUN 7 1994

OFFICE OF THE CLERK
No. 93-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

LEE FISHER
Ohio Attorney General

JAMES C. SAUER
(Counsel of Record)
BARTON A. HUBBARD
Assistant Attorneys General
RICHARD A. CORDRAY
State Solicitor
SIMON B. KARAS
Deputy Chief Counsel
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
(614) 466-5967
COUNSEL FOR PETITIONER

88 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A STATE VIOLATES THE EQUAL PROTECTION CLAUSE WHEN IT DRAWS A RATIONAL CLASSIFICATION AMONG TAXPAYERS FOR TAX AND REVENUE PURPOSES THAT DIFFERS FROM THE DISTINCT CLASSIFICATIONS THE STATE HAS DRAWN ABOUT THOSE SAME PERSONS FOR REGULATORY OR OTHER PURPOSES UNDER THE STATE'S POLICE POWERS.

II. WHETHER A COURT CAN PROPERLY FIND A VIOLATION OF THE EQUAL PROTECTION CLAUSE BY IGNORING PLAUSIBLE POLICY REASONS THAT SUPPORT A STATE'S RATIONAL TAX CLASSIFICATION, RELYING SOLELY ON THEORETICAL DISCRIMINATION THAT IS NOT SHOWN TO HAVE ACTUALLY OCCURRED, AND ABSENT ANY INVIDIOUS DISCRIMINATION OR BAD FAITH ACTIONS BY STATE OFFICIALS.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

DECISIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE CONSISTENT STANDARDS LAID DOWN BY THIS COURT IN MANY PRIOR DECISIONS EVALUATING STATE TAX CLASSIFICATIONS UNDER THE EQUAL PROTECTION CLAUSE 10

A. State Tax Classifications That Rest Upon A Rational Basis Do Not Violate The Equal Protection Clause, And In Making Distinctions For Tax Purposes, States Are Not Bound By Classifications They Have Drawn For Unrelated Purposes Under Their Police Powers 10

B. The Court Below Improperly Ignored Several Rational Bases That Were Put Forward To Support The State's Tax Classification 14

C. The Court Below Improperly Invalidated This Rational Tax Classification On The Basis Of Its Own Incorrect Notions About Theoretical Discrimination That It Assumed To Exist Here 16

II. THE DECISION BELOW CONFLICTS WITH DECISIONS BY OTHER STATE COURTS OF LAST RESORT THAT HAVE FAITHFULLY ADHERED TO THIS COURT'S DECISIONS APPLYING THE EQUAL PROTECTION CLAUSE TO STATE TAX CLASSIFICATIONS 19

III. THE DECISION BELOW MERITS REVIEW BECAUSE IT IMPROPERLY INTERFERES WITH THE STATE SYSTEM OF TAXATION ON ALLEGED GROUNDS OF FEDERAL LAW THAT ARE ERRONEOUS, AND THUS THIS IMPROPER INTERFERENCE CANNOT BE REDRESSED BY THE STATE'S OWN GOVERNMENT UNLESS THIS COURT INTERVENES BY GRANTING REVIEW 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Allied Stores of Ohio, Inc. v. Bowers,
358 U.S. 522 (1959) 8, 11

American Sugar Refining Co. v. Louisiana,
179 U.S. 89 (1900) 15

Boothe Financial Corp. v. Lindley (1983),
6 Ohio St. 3d 247, *cert. denied*,
464 U.S. 1057 (1984) 23, 25

Boston Real Estate Bd. v. Department of Pub. Utils.,
136 N.E.2d 243 (Mass. 1956) 21

Bosworth v. Pledger, 810 S.W.2d 918 (Ark.),
cert. denied, 112 S.Ct. 617 (1991) 19, 20

C. Thomas Stores Sales System v. Spaeth,
297 N.W. 9 (Minn. 1941) 13, 21

Carmichael v. Southern Coal & Coke Co.,
301 U.S. 495 (1937) 11

Charleston Federal Savings & Loan Ass'n v. Alderson,
324 U.S. 182 (1945) 12, 17

Chesterfield Cablevision, Inc. v. County of Chesterfield,
401 S.E.2d 678 (Va. 1991) 20

Citizens' Telephone Company v. Fuller,
229 U.S. 322 (1913) 14

Page

City of Cleveland v. Public Utilities Comm'n,
127 Ohio St. 433 (1934) 13

Fortnightly Corp. v. United Artists Television, Inc.,
392 U.S. 390 (1968) 21

Kinney v. Kaiser Alum. & Chem. Corp. (1975),
41 Ohio St. 2d 120 4

Madden v. Kentucky, 309 U.S. 83 (1940) 11

MCI Telecommunications Corp. v. Limbach (1994),
68 Ohio St. 3d 195 1

Nordlinger v. Hahn, 112 S. Ct. 2326 (1992) 12, 13, 23

Northwestern States Portland Cement Co. v. Minnesota,
358 U.S. 450 (1959) 17

Ohio Oil Company v. Conway,
281 U.S. 146 (1929) 10

Pacific Exp. Co. v. Siebert, 142 U.S. 339 (1892) 14

Roberts & Shaffer Co. v. Emerson,
271 U.S. 50 (1926) 17

Sioux City Bridge Co. v. Dakota County,
260 U.S. 441 (1922) 17, 18

Snowden v. Hughes, 321 U.S. 1 (1943) 22

State, ex rel. Struble v. Davis (1937), 132 Ohio St. 555 4

Page

State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 363 S.E.2d 73 (N.C. App. 1987) 20

Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974) 21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, §1, cl. 3 . . . . . *passim*

Ohio Const. Art. I, § 2 4

STATUTES & RULES

28 U.S.C. §1257(a) 2

Ohio Rev. Code §4905.03(A)(2) 2, 6

Ohio Rev. Code §4927.04(B) 3

Ohio Rev. Code §5727.01(E)(2) 2, 4

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. 93-

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,

Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, the Tax Commissioner of Ohio, respectfully prays that a Writ of Certiorari issue to review the judgment entered by the Ohio Supreme Court in this proceeding.

DECISIONS BELOW

The Opinion of the Ohio Supreme Court (App., *infra*, at A-2 to A-12) is reported as *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St. 3d 195, 625 N.E. 2d 597. The Order of the Ohio Supreme Court, denying the Motion for Rehearing (App., *infra*, at A-29), is reported as *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St. 3d 1474. The Decision and Order of the Ohio Board of Tax Appeals (App., *infra*, at A-13 to A-28) is unreported.

JURISDICTION

The Ohio Supreme Court rendered its Opinion on February 2, 1994. A Motion for Rehearing was denied in an Order entered on March 9, 1994. This Petition for Certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> SECTION 1. . . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

2. Section 5727.01(E)(2) of the Ohio Revised Code provides:

> (E) Any person, firm, partnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated:
>
> (2) Is a telephone company when engaged in the business of transmitting telephonic messages to, from, through, or in this state;

3. Section 4905.03(A)(2) of the Ohio Revised Code provides:

> (A) Any person, firm, copartnership, voluntary association, joint-stock association,

company, or corporation, wherever organized or incorporated, is:

(2) A telephone company, when engaged in the business of transmitting telephonic messages to, from, through, or in this state and as such is a common carrier;

4. Section 4927.04(B) of the Ohio Revised Code provides:

(B) Upon the application of any telephone company having fewer than fifteen thousand access lines, the public utilities commission may, by order, exempt such company, with respect to any public telecommunications service it provides, from any provision of Chapter 4905. or 4909. of the Revised Code that is specified and requested in such application, except [listed] sections . . . of the Revised Code; or may establish alternative regulatory requirements to apply to such company and service, provided the commission finds that the alternative requirements are in the public interest.

STATEMENT OF THE CASE

This case originated in the Ohio Board of Tax Appeals as an appeal by Respondent, MCI Telecommunications Corporation, from a Certificate of Determination issued by Petitioner that assessed the value of MCI's property for purposes of Ohio's public utility property tax for 1987. In its administrative appeal, MCI objected to the value determined for its property and to the method used by Petitioner in apportioning such value among various taxing districts in Ohio. MCI also alleged that the assessment of its property at the same percentage prescribed for other public utilities denied it the equal protection of the laws under the United States and Ohio Constitutions.[1]

At a hearing conducted by the Board of Tax Appeals, evidence was offered about Petitioner's application of the term "telephone company," contained in section 5727.01(E)(2) of the Ohio Revised Code, in determining the proper scope of the public utility property tax. The statute defines a person, firm, partnership, association, company, or corporation as a "telephone company when engaged in the business of transmitting telephonic messages to, from, through, or in this state." The administrator of the Public Utility Tax Division in Petitioner's office testified that Petitioner considered the term "transmitting" to mean

---

[1] Although Respondent mentioned the Ohio Constitution in its presentation of this case to the Ohio Supreme Court, there can no serious suggestion here that the decision below rests on any adequate and independent state ground. Not only did the court below cite federal decisions almost exclusively in its ruling, but also that court has definitively held that the "limitations placed upon governmental action by the Equal Protection Clauses of the Ohio and United States constitutions are essentially identical." *Kinney v. Kaiser Alum. & Chem. Corp.* (1975), 41 Ohio St. 2d 120, 123; *see also State, ex rel. Struble v. Davis* (1937), 132 Ohio St. 555, 560 (state equal protection provision "constitutes no restriction not already imposed by the federal Constitution" on methods of taxation).

operating an integrated system of transmission equipment, defining "transmitting" as follows:

> operating, either through ownership or lease, an integrated system of switching devices, circuit equipment, transmission equipment such as transmitters, receivers, microwave radio equipment, coaxial, fiberoptic and other kinds of cable and wire, and associated equipment in a manner that would allow a telephonic message to be sent across intervening space or distances from its origination to its termination, or between its origination and its termination.

A-54. He further stated that a mere "reseller," *i.e.*, a person who acquired long distance telephone service from an actual "telephone company" in order to resell that service to its customers, was not itself considered to be a "telephone company" if it did not operate its own integrated system of transmission equipment. Under this classification, MCI constitutes a "telephone company" for purposes of the public utilities property tax, but resellers do not.

MCI also offered into evidence an order of the Public Utilities Commission of Ohio (PUCO) in a case which the PUCO itself had initiated to determine the proper scope of its regulatory authority. *See* A-29. In that order, the PUCO had determined that two types of long distance carriers existed within the telecommunications industry: (1) "facility-based carriers," which use their own transmission equipment, and (2) long distance "resellers," which lease WATS line service from the facility-based carriers and then resell the service to their own customers. The PUCO order determined that both facility-based carriers and resellers should be treated as "telephone companies" for regulatory purposes, thus making both kinds of entity subject to the jurisdiction and oversight of the PUCO with regard to rates, service, and other regulatory matters. Thus, the PUCO's approach

adopted for regulatory purposes differed from Petitioner's approach adopted for tax purposes.

Although the Board of Tax Appeals liberally received evidence, as an administrative body it did not make any factual findings on the constitutional equal protection issue raised by MCI and did not determine that issue. The Board ruled in favor of MCI, however, on the separate apportionment issue raised under state law.

Both the factual and legal issues raised by MCI's equal protection claim were presented next on further appeal to the Ohio Supreme Court. In that appeal, MCI suggested various reasons why its tax bill should be found to violate the Equal Protection Clause. In one of its arguments, MCI contended that the Tax Commissioner's exclusion of resellers from the category of "telephone companies," or purposes of the public utilities property tax, unlawfully discriminated against MCI. The upshot, according to MCI, was that it was being treated differently from other businesses that it regarded as being properly located within the same tax classification as MCI.

In a 4-3 ruling, the Ohio Supreme Court stated that the Equal Protection Clause was violated in this case. In particular, the court stressed the similarities between the statutory definition of a "telephone company" for purposes of taxation, Ohio Rev. Code §5727.01(E)(2), and for purposes of regulation by the PUCO, *see id.* §4905.03(A)(2). Citing the PUCO's broader construction, for its own regulatory purposes, of the term "telephone company" to include resellers, the court concluded that Petitioner's different construction of the same term for tax purposes denied MCI the equal protection of the laws. The court also ordered Petitioner to reduce MCI's assessment percentage to correspond to the percentage used for general business property.

In reaching this conclusion, the Ohio Supreme Court did not appear to consider whether plausible policy reasons might

support Petitioner's distinction between a facility-based carrier and a reseller, for the purpose of assessing an *ad valorem* property tax. Petitioner contended, for example, that such a distinction for property tax purposes could be explained by the recognized differences in the property held and used by one who performs a service and by one who merely contracts to have another perform the same service. Petitioner also contended that the distinction between these two kinds of entity could be justified based on differences in their respective economic positions, in particular the ability of facility-based carriers, including MCI, to pass on any higher tax costs to their customers, including resellers. Finally, the court failed to consider that a desire to encourage greater competition among resellers might reasonably have motivated this same distinction as a matter of state tax policy.

The court below considered none of these plausible policy reasons for the classification applied by Petitioner. Instead, the court simply assumed that there could be no rational basis to classify such entities differently for tax purposes, given that the PUCO had classified them as being the same for its own distinct regulatory purposes.

Although the court below consciously assumed the role of factfinder in this case, it made no factual finding that any regulated resellers that held property that was subject to tax in Ohio actually existed in 1987. Thus, no predicate factual finding of any actual discrimination against MCI in favor of any existing resellers, let alone of any invidious discrimination, was ever made in this case. Any supposed "unconstitutional discrimination" was entirely theoretical.

On February 14, 1994, Petitioner moved for rehearing, which was denied without comment on March 9, 1994. This Petition for Certiorari followed.

REASONS FOR GRANTING THE WRIT

The proliferation of many diverse businesses within the telecommunications industry has produced new classification problems for the federal and state governments in the distinct fields of taxation and regulation. This growing industry includes both those whose business is the transmission of telephonic messages through their own integrated systems of transmission equipment (the facility-based carriers), and those whose business is limited to buying and reselling such services (resellers). The effect of the decision below, if it is allowed to stand, would be to force the State of Ohio to restructure its tax system to treat these two groups of businesses exactly alike, despite the considerable differences between them, for purposes of enforcing the *ad valorem* tax assessed on property used in a business. More generally, the effect of the decision below is to place the State's system of taxation into a strait-jacket wherein its classifications are not permitted to diverge in any respect from classifications drawn by other state entities exercising regulatory authority or various other police powers.

By contrast, this Court's traditional response to such problems has been to avoid raising them to an extreme constitutional pitch. Instead, this Court uniformly gives considerable latitude to the States in devising systems of taxation and revenue that are rationally grounded in plausible policy determinations. Thus, in the absence of some manifest showing of hostile or invidious discrimination, this Court has consistently held that the lower courts should defer to reasonable or even plausible legislative classifications in the spheres of economics and taxation. *See, e.g., Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959) ("the States have a very wide discretion in the laying of their taxes.").

The decision by the Ohio Supreme Court in this case has, quite simply, departed from these principles. Instead of deferring to reasonable legislative classifications, the court below would

require the State to import classifications from the field of public utility regulation and apply them with rigid identity to the very different field of state taxation. Instead of considering whether any rational basis existed to support the State's system of taxation in this case, the court below ignored the plausible policy reasons advanced by Petitioner. Indeed, the court below went so far as to hypothesize its own theoretical inequalities and used them to invalidate the State's rational tax classification. It did so despite the fact that no specific resellers were actually found by the court to have been in operation in 1987 with taxable property in Ohio.

One of the immediate results of this ruling has been potentially devastating consequences for local government treasuries, including many school districts, which had already budgeted and spent these funds.[2] Even more troubling, the ruling below, based as it is on supposed principles of federal law, requires the State of Ohio to restructure its tax system without any possibility of redressing the issues thus joined at the state level. The only alternative is for this Court to intervene and decide whether the ruling below is truly consistent with its prior decisions. If the Court declines to do so, then this ruling threatens to hamstring the State of Ohio and any other states that may follow this same erroneous view of federal law from drawing reasonable classifications for purposes of *ad valorem* taxation in their jurisdictions.

---

[2] Petitioner represents in his official capacity as Tax Commissioner that the decision below would require massive refunds, to MCI and other telephone companies, of taxes that are locally assessed. Over the open tax years from 1987 to 1993, for example, the estimated amount of money that would have to be refunded is approximately $150,544,930, with an additional $49,679,826 in interest, for a total of $200,224,756. It is further estimated that 70% of this amount will have to be recovered from the schools. Needless to say, there are few if any school districts in the State whose budgets can very well absorb such punishment.

Unless it is reversed, the ruling below will do much more than threaten past assessments; it will severely limit the State's ability to make similar classifications in the future between different businesses that operate in the same regulated industry, whether it be the telecommunications industry or any other. The ruling below thus would "subject the essential taxing power of the State to an intolerable supervision, hostile to the very principles of our Government and wholly beyond the protections which the general clause of the Fourteenth Amendment was intended to assure." *Ohio Oil Company v. Conway*, 281 U.S. 146, 159 (1929). Accordingly, this Court should accept review in this case and reverse the decision of the Ohio Supreme Court.

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE CONSISTENT STANDARDS LAID DOWN BY THIS COURT IN MANY PRIOR DECISIONS EVALUATING STATE TAX CLASSIFICATIONS UNDER THE EQUAL PROTECTION CLAUSE.

A. State Tax Classifications That Rest Upon A Rational Basis Do Not Violate The Equal Protection Clause, And In Making Distinctions For Tax Purposes, States Are Not Bound By Classifications They Have Drawn For Unrelated Purposes Under Their Police Powers.

This Court has consistently recognized the broad power of the States to select the subjects of taxation and to make the unavoidable classifications that inhere in any functioning system of state taxation. Thus the Court long ago held that the States "may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support

it." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937). Subsequent decisions have reaffirmed this extremely deferential standard to be applied in assessing the validity of state tax classifications that are challenged under the Equal Protection Clause.

In *Allied Stores*, for example, the Court restated two decades later that the "States have a very wide discretion in the laying of their taxes" and that they "may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products." 358 U.S. at 526-27. The Court recognized that the States "have the attributes of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests," and emphasized that the Equal Protection Clause does not prohibit "the flexibility and variety that are appropriate to reasonable schemes of state taxation." *Id.* at 526. In *Allied Stores* itself, this Court upheld an Ohio statute that exempted certain property of nonresidents from *ad valorem* taxation, if the property were held in a storage warehouse for storage only. The Court determined that Ohio residents were not denied the equal protection of the laws, because even if any discrimination had occurred at all, it was neither "invidious nor palpably arbitrary." *Id.* at 529.

In addition, in *Allied Stores* the Court noted its longstanding principle that a state legislature "need not explicitly declare its purpose" in enacting legislation. 358 U.S. at 528. The Court therefore has a duty, in deferring to any rational legislative tax classification, to raise for itself any reasonable purpose that could conceivably have motivated the state legislature to draw such a classification. In other words, a state tax classification does not violate the Equal Protection Clause "if any state of facts reasonably can be conceived that would sustain it." *Id.* As the Court had previously summed up its uniform approach in such cases, "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 87 (1940).

In the recent decision in *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992), this Court reasserted these same principles and again directed that a broad discretion must be afforded when the States are obliged to draw classifications for purposes of taxation. The Court again recognized both the presumption of constitutionality that attaches to such enactments and the deference which courts must give to any "plausible policy reason for the classification." *Id.* at 2332. "This standard is especially deferential in the context of classifications made by complex tax laws." *Id.* And the Court emphatically reiterated that the Equal Protection Clause "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification," as long as that purpose may conceivably or reasonably have been its purpose or policy in drawing that classification. *Id.* at 2334.

In the instant case, however, the Ohio Supreme Court applied a very different standard of review, ignoring the presumption of constitutionality and instead contenting itself simply to assume that no rational basis could exist for treating two groups of taxpayers separately for tax purposes, when the two groups had been included in the same class for distinct regulatory purposes. Specifically, the court below relied on an order of the Ohio Public Utilities Commission, which had determined that resellers of telecommunications services, like the telephone companies themselves, were transmitting telephonic messages and thus were subject to regulation within the Commission's jurisdiction.

The assumption made by the court below -- that no rational basis could exist for classifying resellers of telephone services separately from telephone companies -- is simply wrong. The fact that two entities come within the same class for one state purpose does not preclude them from being classified separately for any other state purpose. As this Court succinctly summarized in *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U. S. 182, 191 (1945), citing numerous prior decisions:

> It is plain that the Fourteenth Amendment does not preclude a state from placing notes and receivables in a different class from personal property used in agriculture and the products of agriculture, including livestock, and taxing the two classes differently, even though the state places them in a single class for other purposes of taxation. *Bell's Gap. R. Co. v. Pennsylvania, supra*, 134 U.S. 237; *Home Ins. Co. v. New York, supra*, 134 U.S. 606; *Coulter v. Louisville & N.R. Co., supra*, 196 U.S. 608, 609; *Klein v. Board of Tax Supervisors*, 282 U.S. 19.

So it is here. The purposes served by the regulation of telecommunications services provided to the public differ greatly from the purposes served by the imposition of an *ad valorem* tax on the property used in the business of transmitting telephonic messages. The regulation of public utilities is an exercise of the State's police power to ensure that services are provided to the public "without discrimination, at a just and reasonable cost." *City of Cleveland v. Public Utilities Comm'n*, 127 Ohio St. 433, 436 (1934). In contrast, statutes imposing taxes are designed to raise revenue and may also be used to advance unrelated economic and policy objectives. *Nordlinger*, 112 S. Ct. at 2332-33. As the Minnesota Supreme Court has correctly observed: "The selection of subjects for taxation and exemption involves different considerations than the selection and exemption of subjects of a police regulation." *C. Thomas Stores Sales System v. Spaeth*, 297 N.W. 9, 18 (Minn. 1941).

The fact that resellers may be included in the same class as facility-based carriers for the purposes of regulating the services they provide to the public thus has little or no bearing on whether they can or should be classified separately for purposes of taxation without running afoul of the Equal Protection Clause. The court below thus had absolutely no justification for blindly relying on a

PUCO order to preclude any different classification for tax purposes under the Equal Protection Clause.

B. The Court Below Improperly Ignored Several Rational Bases That Were Put Forward To Support The State's Tax Classification.

A number of plausible policy reasons support the State's distinction for tax purposes between resellers and facility-based carriers. First, it is undisputed that resellers buy the telephonic services that they later resell from facility-based carriers or from other resellers who in turn had purchased the service originally from a facility-based carrier. In other words, all long distance transmissions are originally made by facility-based carriers, which as "telephone companies" are required to pay tax on a higher percentage of their value.

The distinction between resellers and facility-based carriers, as applied by Petitioner in this case, is consistent with this Court's express recognition, for more than a century, of a legitimate distinction that can be drawn between one who performs a service for customers and one who contracts with the performer in order to make that same service available to its own customers without performing the service itself. *See Pacific Exp. Co. v. Siebert*, 142 U.S. 339 (1892) (express companies, which contracted with railroads and steamboat companies for the transportation services they sold, were distinguished from the railroads and steamboat companies themselves, which operated their own transportation equipment, for purposes of a gross receipts tax). In *Citizens' Telephone Company v. Fuller*, 229 U.S. 322 (1913), for example, this Court rejected an equal protection challenge to a Michigan statute which imposed an *ad valorem* tax on telephone companies but exempted companies with gross receipts not exceeding $500. The Court cited differences between the taxed and untaxed companies, namely that the untaxed

companies tended to be "rural" or "roadway" companies that were operated by a manager in a manner similar to many of the current "resellers," with the objective of obtaining cheaper telephone service by that means.

Furthermore, the facility-based carriers, which are the original source of all long distance transmissions, are squarely in a position to pass their costs on to their customers, including both consumers and resellers. MCI and the other telephone companies thus are able to pass on any higher incidence of tax burden directly to the resellers who must purchase all long distance transmission services from them. The ability of the facility-based carriers to pass on such costs plainly provides a rational basis for treating them differently from mere resellers for tax purposes.

Even if it were determined that competition between facility-based carriers might limit their ability to pass along their costs to customers (including resellers), the separate classification of resellers could serve yet another rational purpose. Assessment of resellers at a lower listing percentage for purposes of the *ad valorem* tax could be expected to create increased competition among resellers with the intent of stimulating price benefits that might ensue to consumers. An apt comparison is *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89 (1900), in which this Court sustained a license tax on the business of refining sugar. It held that an exemption from the tax for planters and farmers who refined their own sugar could be justified on the basis either of differences in the exempted business or as an encouragement to agriculture.

In the present case, however, the Ohio Supreme Court failed to give any such consideration to the challenged classification. On the contrary, it refused even to explore whether there could be any "conceivable" policy reason for Ohio's determination to classify facility-based carriers separately from resellers. By this conspicuous failure, the court below set its decision distinctly apart from the approach required by this Court

and followed by other state courts that have evaluated state tax classifications under the Equal Protection Clause.

C. The Court Below Improperly Invalidated This Rational Tax Classification On The Basis Of Its Own Incorrect Notions About Theoretical Discrimination That It Assumed To Exist Here.

The decision below also contradicts the decisions of this Court by finding a violation of the Equal Protection Clause, and ordering a refund to MCI of tax revenues that had been legally collected, solely on the basis of theoretical inequalities that were never proved to have any actual existence in this case.

The court below held, once again, that Petitioner's exclusion of resellers from the definition of "telephone company" conflicted with the regulatory approach adopted by the PUCO. The Court thus held that any differences in tax treatment between resellers and facility-based carriers constituted a denial of equal protection. The Ohio Supreme Court so held, however, without making any finding of fact that the classification drawn by Petitioner had actually resulted in discrimination against MCI and in favor of any existing reseller. Neither the Court's decision nor the PUCO order, which it referenced, identified any entities as regulated resellers that should have been assessed tax as "telephone companies" in 1987 but were not so assessed. In other words, although MCI claimed that it was being treated differently from resellers who owned property within the State of Ohio, it never proved that any such resellers actually existed who had received the benefit of this supposed differential treatment. The alleged discrimination, therefore, was totally theoretical; the court simply declared that MCI had been denied equal protection by virtue of the classifications in the Petitioner's construction of the statute without making any showing of discrimination in fact.

A showing of discrimination in fact, however, is essential to establish a violation of the Equal Protection Clause. In *Charleston Federal Savings & Loan Ass'n. supra*, this Court rejected a challenge to differences in a state's mode of assessing the property of different taxpayers within a particular class. Based on a finding that the different modes had not been shown to have produced different values, the Court found no violation of the Equal Protection Clause, stating that "the constitutional prohibition applies only to taxation which in fact bears unequally on persons or property of the same class." 324 U.S. at 190. *See also Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 463 (1959) (Court refused to "deal in abstractions"); *Roberts & Shaffer Co. v. Emerson*, 271 U.S. 50, 54-55 (1926) ("one who challenges the validity of state taxation on the ground that it violates the equal protection clause, cannot rely on theoretical inequalities"). In the absence of a demonstration of actual discrimination, the ruling below stands in square conflict with these decisions.

This crucial omission is even more acute when, as here, it is undisputed that the vast majority of telecommunications services sold in 1987 were sold by facility-based carriers that were properly assessed as telephone companies. To the extent that resellers were involved in the resale of services in 1987 at all, their share of the market was quite small. Since such resellers, by definition, did not own or operate any transmission equipment, their reported property would have constituted an even smaller portion of the total property that was actually taxable to telephone companies.

In selecting a proper remedy to correct a violation of the Equal Protection Clause, this Court has considered the relative size of the disadvantaged class, the purpose of the statute, and the unequal treatment to be eliminated. In *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446 (1922), the Court said:

> This court holds that the right of the taxpayer whose property alone is taxed at 100 per

> cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.

Where, however, the purportedly disadvantaged taxpayer has been treated the same as the vast majority of other taxpayers in the alleged class, and it has not even been determined that any specific taxpayer actually was treated differently, there is essentially no unequal treatment to be eliminated. In such circumstances, there is no authority for a remedy that subverts the clear purpose of the statutory classifications respecting the assessment of telephone companies. Under the principle articulated by this Court in *Sioux City Bridge Co.*, *supra*, the remedy ordered below -- that Petitioner must reduce MCI's assessed value -- was neither necessary nor warranted.

As noted above, this same issue is also pending in Ohio with respect to other telephone companies, and so the potential impact of the proper remedy goes far beyond the particular circumstances of this case. The decision below erroneously jeopardizes the efficacy of the current *ad valorem* tax, on the basis of a misapplication of federal constitutional law that cannot be corrected by the state government without the intervention of this Court. The resulting importance to the State of Ohio of the review requested in this case thus cannot be easily overstated.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS BY OTHER STATE COURTS OF LAST RESORT THAT HAVE FAITHFULLY ADHERED TO THIS COURT'S DECISIONS APPLYING THE EQUAL PROTECTION CLAUSE TO STATE TAX CLASSIFICATIONS.

The decision below, which did not faithfully apply the deferential approach that this Court has directed be used to evaluate state tax classifications, also conflicts with the decisions of several other state courts, which have hewn more closely to this Court's uniform body of precedent.

In *Bosworth v. Pledger*, 810 S.W.2d 918 (Ark.), *cert. denied*, 112 S. Ct. 617 (1991), for example, the Arkansas Supreme Court brushed aside an equal protection challenge to a statutory exemption for WATS line telephone service (which the resellers in the instant case were described as purchasing), from a tax imposed on long distance service generally. In upholding the exemption, the court showed proper respect for this Court's long line of precedents, affording great deference to the State's tax classification:

> A state has wide latitude in the exercise of its power of taxation. The power to tax necessarily implies the power to discriminate in taxation. The law does not dictate that tax measures be applied to all members of a class or none. Distinctions are permissible, and if there is any conceivable set of facts to uphold the law's rational basis, it will be upheld. *Id.* at 922 (citing *Carmichael*).

The court then reasoned that the subscribers of WATS lines were primarily businesses, which the legislature could legitimately provide with tax incentives. Thus, the classification had a

sufficient rational basis to validate it. Unlike the ruling below, both the approach and the result in *Bosworth* are consistent with this Court's precedents.

Similar distinctions were discussed in *State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co.*, 363 S.E.2d 73, 78 (N.C. App. 1987), where the court described the same telecommunication market participants at issue in the instant case: "Interexchange carriers (IXCs) can generally be divided into three categories with distinctive characteristics: AT&T, other common carriers (OCCs), and 'resellers,' of long distance services." The court noted that resellers "do not maintain their own facilities; rather, they purchase 'use time' from facility operating companies and offer it for resale to the consuming public."

More generally, many state courts have rejected equal protection challenges to classifications that distinguish between the business of performing a service or making a product and the distinct business of "reselling" a service or product. Such classifications have been upheld for purposes of both regulation and taxation.[3]

The identification of those who resell telecommunications service as a separate class for purposes of taxation is comparable to the distinction often made between cable television companies and broadcasting companies. In *Chesterfield Cablevision, Inc. v. County of Chesterfield*, 401 S.E.2d 678 (Va. 1991), the Virginia Supreme Court easily rejected an equal protection challenge to a license tax which applied to cable television services but not to television broadcasting services. The court cited one of its prior

---

[3] Even in the area of PUCO regulation that the Ohio Supreme Court referenced in the instant case, subclassifications have been recognized for the purpose of exempting some companies in the class from such regulation. For instance, Ohio law authorizes the exemption from PUCO regulation of telephone companies with fewer than fifteen thousand access lines. Ohio Rev. Code §4927.04(B).

decisions, which had, in turn, relied on *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), and *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), where this Court had drawn the same distinction between the "performance" function of a broadcaster and the receipt and retransmission of broadcast signals, which are undertaken by cable companies.

Similarly, in *C. Thomas Stores Sales System v. Spaeth*, 297 N.W. 9 (Minn. 1941), the Minnesota Supreme Court approved a statute that imposed a tax on chain stores, but exempted the stores of manufacturers that sold only those products they had produced. Applying the "rational basis" test, the court found that the "difference between the selling of products of others by chain stores and the selling of their own products by manufacturers or producers affords a sufficient basis for the distinction." *Id.* at 17.

Again, in *Boston Real Estate Bd. v. Department of Pub. Utils.*, 136 N.E.2d 243 (Mass. 1956), the distinction between one who performed a utility service and one who resold the same service was made even more consequential. In that case, the Massachusetts Supreme Court declined to overturn an order that was admittedly designed to eliminate competition by certain resellers of electricity service. The court found that the complaining parties had no vested right to conduct the business of reselling the utility service and that such resales were not in the public interest. The court concluded, therefore, that an order which eliminated wholesale rates for such resellers, while continuing them for resellers in areas not adequately served by the electric company, satisfied the Equal Protection Clause. *Id.* at 250-52.

It follows from these diverse examples that separate classification of facility-based carriers and resellers for taxation purposes is not at all unique and is consistent with classifications which have been upheld against equal protection challenge by numerous other courts. Those courts upheld the classifications

because they obeyed this Court's direction to make their own inquiry into whether any rational basis could be conceived to support the classifications. In the instant case, by contrast, the Ohio Supreme Court failed to make any such inquiry and thus rendered a decision that is out of step with the other state courts and this Court. Because this ruling involves a rapidly developing industry, it will, unless reversed, severely inhibit the State's traditional authority to employ rational distinctions in designing its own system of taxation, both within the telecommunications industry and in other industries as well.

III. THE DECISION BELOW MERITS REVIEW BECAUSE IT IMPROPERLY INTERFERES WITH THE STATE SYSTEM OF TAXATION ON ALLEGED GROUNDS OF FEDERAL LAW THAT ARE ERRONEOUS, AN IMPROPER INTERFERENCE THAT CANNOT BE REDRESSED BY THE STATE'S OWN GOVERN-MENT UNLESS THIS COURT INTERVENES BY GRANTING REVIEW.

The Ohio Supreme Court's freewheeling reliance in this case on its own unconventional views about federal constitutional law also warrants review by this Court because it poses difficult problems of federalism here. By grounding its holding in the United States Constitution, the court below has insulated the practical effects of its ruling from any correction or redress by the other branches of state government or even through direct action by the citizens of the State.[4]

---

[4] It might also be noted that this Court has repeatedly held that mere unequal applicatio- of a statute does not constitute a denial of equal protection, unless an intentional or invidious discrimination is shown. *See, e.g., Snowden v. Hughes*, 321 U.S. 1, 8 (1943). In any event, however, the important consequence of the ruling below is that it elevated

(continued...)

Such easy but mistaken reliance on federal constitutional law thus impairs the legislature's proper authority to determine the structure of state tax laws as well as the ability of the Tax Commissioner to implement such laws. Unfortunately, the Ohio Supreme Court's decision below is not an isolated case. Instead, it relies heavily on the court's earlier decision in *Boothe Financial Corp. v. Lindley* (1983), 6 Ohio St. 3d 247, *cert. denied*, 464 U.S. 1057 (1984), in which the court rejected Ohio's adoption of the "cost" approach in valuing property held by leasing companies for use in their businesses. In *Boothe*, the Ohio Supreme Court had concluded that, because the costs of a manufacturer-lessor were lower than those of other lessors, the State's valuations denied other lessors the equal protection of the laws. As in the present case, the Court's decision was entirely unsympathetic to any proposed inquiry into whether there was any reasonable basis for the cost approach. Instead, it simply concluded that because the property of some was valued differently from "essentially identical" property of others, the resulting assessments violated the Equal Protection Clause.

The subsequent decision of this Court in *Nordlinger, supra*, made plain that property could, for plausible policy reasons, be valued using a cost approach, despite "dramatic disparities in the taxes paid by persons owning similar pieces of property." *Nordlinger, supra,* 112 S.Ct. at 2329. Indeed, the decisions in *Nordlinger* and *Boothe Financial* could hardly be more at odds with one another. Nonetheless, in the instant case the Ohio Supreme Court cited both decisions without appearing to concede their inconsistency, and relied heavily on *Boothe Financial* in finding an equal protection violation in this case. The Ohio Supreme Court thus appears inclined in matters of *ad valorem*

---

[4](...continued)
the claim of improper or unequal treatment to a federal constitutional claim, thus frustrating any attempt to address the ensuing revenue shortfalls by restructuring the state tax system without first and always obeying the strict dictates erroneously imposed by the court below.

taxation to apply a far more restrictive interpretation of the Equal Protection Clause in the United States Constitution than can be reconciled with this Court's own controlling decisions. Unless this Court intervenes by granting certiorari, which it declined to do in *Boothe Financial*, the ability of Ohio's legislature to classify property for purposes of *ad valorem* taxation with any degree of assurance will become increasingly uncertain because of the insurmountable barrier of federal constitutional law thus erroneously erected by the Ohio Supreme Court. The inevitable result is that this method of taxation will become increasingly unreliable for the schools and other local taxing authorities, which at present are extremely dependent on *ad valorem* taxation for their continued operations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LEE FISHER
Ohio Attorney General

JAMES C. SAUER
(Counsel of Record)
BARTON A. HUBBARD
Assistant Attorneys General
RICHARD A. CORDRAY
State Solicitor
SIMON B. KARAS
Deputy Chief Counsel
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
(614) 466-5967
COUNSEL FOR PETITIONER

June 7, 1994

APPENDIX

Page

Opinion, February 2, 1994
Ohio Supreme Court A-2

Decision and Order,
Board of Tax Appeals A-13

Order, March 9, 1994
Ohio Supreme Court A-29

In re Regulatory Framework for Telecommunication Services
In Ohio (1985), 66 P.U.R. 4th 572,
No. 84-944-TP-COI A-30

Afidavit of James A. Witzel A-55

A-2

No. 92-1199

THE SUPREME COURT OF OHIO

MCI TELECOMMUNICATIONS CORPORATION,
APPELLANT AND CROSS-APPELLEE,

V.

LIMBACH , TAX COMMR.,
APPELLEE AND CROSS-APPELLANT.

OPINION

Decided and Filed February 2, 1994

APPEALS
from the Board of Tax Appeals

MCI Telecommunications Corporation, Appellant and Cross-Appellee, v. Limbach, Tax Commr., Appellee and Cross-Appellant. [Cite as MCI Telecommunications Corp. v. Limbach (1994), 68 Ohio St.3d 195.]

Taxation -- Personal property tax -- Facility-based interexchange telephone message carrier's equipment taxed at one hundred percent of true value while its competitors' equipment is assessed at thirty-one percent of true value -- Equal Protection Clause violated, when -- Notice of Appeal to Board of Tax Appeals -- In resolving questions regarding effectiveness of a notice of appeal, Supreme Court not disposed to deny review by a hypertechnical reading of the notice -- Unconstitutionality of tax statute raised -- Board of Tax Appeals receives evidence and Supreme Court makes constitutional finding.

(No. 92-1199 -- Submitted October 19, 1993 -- Decided February 2, 1994.)

Appeals and Cross-Appeal from the Board of Tax Appeals, No. 88-G-1137.

MCI Telecommunications Corporation ("MCI"), appellant and cross-appellee, claims that the Tax Commissioner, appellee and cross-appellant, denied it equal protection of the laws because she assessed its equipment for personal property tax purposes at one hundred percent of true value but assessed its competitors' at thirty-one percent of true value. MCI projects that this treatment resulted in its incurring an additional tax liability of $4,659,625.

The commissioner, on the other hand, cross-appeals the BTA's ruling apportioning MCI's wireless, microwave transmitting equipment to the taxing districts in which MCI operates according to MCI's wire-mile ratio, calculated on MCI's fiber-optic cable. She asserts that the equipment should be apportioned according to its physical location.

MCI is a facility-based, interexchange carrier of telephone messages. It transmits telephone calls between local telephone companies' local access transport areas ("LATAs") -- intrastate, interstate, and internationally. MCI provides "intercity telephone services * * * primarily over its own coast-to-coast terrestrial microwave and optical fiber communications system and, to a far lesser extent, over facilities leased from other common carriers and by satellite transmission." MCI began as a reseller of long distance service, leasing lines from other long distance carriers, but acquired, over time, wireless, microwave equipment and, by 1987, fiber-optic cable.

Typically, MCI transmits a call by switching it from the LATA, with MCI's switching equipment, into MCI's system or onto a leased line. It carries the message to the destination LATA and switches the call, again with its switching equipment, into the destination LATA, which carries the call to the destination telephone. If transmitting on the microwave equipment, MCI bounces a radio signal from tower to tower until received at a terminal. If transmitting on the fiber-optic system, MCI converts the signal to light and transmits the light signal over the fiber-optic transmission links to the destination switching equipment.

For tax year 1987, the year in dispute, MCI reported its equipment to the commissioner under R.C. 5727.08. The commissioner depreciated the original cost of the equipment by fifty percent to determine the equipment's true value and assessed the equipment at one hundred percent of true value. The commissioner then apportioned the assessed or taxable value of the microwave equipment to the taxing district in which it was physically located. However, she apportioned the fiber-optic property to the taxing districts where that type of property was located according to the ratio of miles of fiber-optic cable in the given district to the total miles of fiber-optic cable in the entire state.

MCI challenged these decisions. On appeal to the BTA, it maintained that all its property, not just its fiber-optic property, should be apportioned according to the wire-mile ratio. It also presented evidence to the BTA in support of its contentions that (1) it is not a telephone company, but a general business; (2) resellers, which, instead of owning transmission equipment, lease WATS lines from AT&T or other inter-LATA carriers to transmit its messages, are treated as general businesses and assessed at thirty-one percent of true value; and (3) two facility-based competitors, Allnet Communication Services, Inc. and Cable & Wireless Management Services, Inc., were treated by the commissioner as general businesses and were also assessed at thirty-one percent.

The BTA liberally received evidence but made no findings of fact on the constitutional, equal-protection questions. As to the apportionment question, the BTA reversed the order of the commissioner. The BTA agreed with MCI and directed the commissioner to apportion all the equipment according to the wire-mile formula.

The cause is before this court upon an appeal and cross-appeal as a matter of right.

Jones, Day, Reavis & Pogue, John C. Duffy, Jr., Beth Heifetz, Timothy B. Dyk, Walter Nagel and Douglas A. Richards, for appellant and cross-appellee.

Lee I. Fisher, Attorney General, Barton A. Hubbard and James C. Sauer, Assistant Attorneys General, for appellee and cross-appellant.

Per Curiam.

A

Specifying Error in the Notice of Appeal

In paragraph four of its notice of appeal filed with the BTA, MCI asserted that the commissioner's application of R.C. 5727.10 to it denied it equal protection of the laws, and, in paragraph five, that the commissioner's failure to apply the general personal property tax statute to it, R.C. 5711.22, also denied it equal protection. The commissioner, in her Proposition of Law No. III, asserts the notice of appeal was specific enough to challenge the statutes on their face but not specific enough to challenge them as applied to MCI. MCI, in its Proposition of Law No. V on cross-appeal, maintains that the commissioner is hypertechnically attempting to deny it an appeal.

According to *Buckeye Internatl., Inc. v. Limbach* (1992), 64 Ohio St.3d 264, 267, 595 N.E.2d 347, 350:

"Failure to include errors in the notice of appeal to the BTA results in the BTA's lack of jurisdiction over the errors and the court's inability to review such errors."

Citing *Goodyear Tire & Rubber Co. v. Limbach* (1991), 61 Ohio St.3d 381, 383, 575 N.E. 2d 146, 147, we concluded that Buckeye had raised an alternate argument, rather than a distinct, separate objection, because "it specified the commissioner's action that it questioned, cited the statute under which it objected, and asserted the treatment it believed the commissioner should have applied to the income." Id., 64 Ohio St.3d at 268, 595 N.E.2d at 350. Moreover, we stated:

"In resolving questions regarding the effectiveness of a notice of appeal, we are not disposed to deny review by a hypertechnical reading of the notice." Id.

Here, MCI set forth the action it contested, stated that this action denied it equal protection of the laws, and asserted the statute under which it should have been taxed. Under Buckeye, the notice sufficiently sets forth the claim that the statutes were unconstitutionally applied to MCI.

B

BTA's Role in Constitutional Questions

The BTA understood its role to be a receiver of evidence for constitutional challenges. Accordingly, it did so, giving the parties wide latitude in presenting the evidence. The BTA determined no facts on the constitutional questions. The commissioner, however, in her Proposition of Law No. IV, contends that the BTA not only receives evidence in this type of case, but must weigh the evidence and determine the facts

necessary for the court's review of the constitutional questions. Since the BTA did not make findings of fact, the commissioner asserts that we should remand the case for the BTA to comply.

In *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, 520 N.E.2d 188, paragraph three of the syllabus, we held:

"The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning this question if presented, even though the Board of Tax Appeals may not declare the statute unconstitutional. (*Bd. of Edn. of South-Western City Schools v. Kinney* [1986], 24 Ohio St.3d 184, 24 OBR 414, 494 N.E.2d 1109, construed.)"

We explained the process, at 232, 520 N.E.2d at 191-192:

"When a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view.

"To accommodate this court's need for extrinsic facts and to provide a forum where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the BTA be that forum. The BTA is statutorily created to receive evidence in its role as factfinder."

Under Cleveland Gear, the BTA need only receive evidence for us to make the constitutional finding. This is because the BTA accepts facts but cannot rule on the question. On the other hand, we can decide the constitutional questions but have a limited ability to receive evidence. Thus, the BTA receives evidence at its hearing, but we determine the facts necessary to resolve the constitutional question.

C

Equal Protection

In Proposition of Law No. III, MCI argues that the commissioner's assessing it for personal property tax purposes at one hundred percent of true value while assessing resellers at thirty-one percent violates the Equal Protection Clauses of the federal and Ohio Constitutions. In her Proposition of Law No. V, the commissioner responds that the record does not support a finding that she or the General Assembly intentionally and systematically discriminated between MCI and similarly situated taxpayers so as to deny MCI equal protection.

According to *Nordlinger v. Hahn* (1992), 505 U.S., 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1, 12: "Equal Protection Clause of the Fourteenth Amendment, §1, commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 [40 S.Ct. 560, 561, 64 L.Ed. 989, 990-991] (1920).

"As a general rule, 'legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.' *McGowan v. Maryland*, 336 U.S. 420, 425-426 [81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, 399] (1961). Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. See, e.g., *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-441 [105 S.Ct. 3249, 3254-3255, 87 L.Ed.2d 313, 320-321] (1985); *New Orleans*

v. Dukes, 427 U.S. 297, 303 [96 S.Ct. 2513, 2517, 49 L.Ed.2d 511, 517] (1976)."

In *Allegheny Pittsburgh Coal Co. v. Webster Cty.* (1989), 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688, the United States Supreme Court upheld the power of the state to divide different kinds of property into classes and to assign to each a different tax burden so long as those divisions and classifications are neither arbitrary nor capricious. However, the court rejected the Webster County assessor's application of the state tax law in a manner that resulted in an unreasonable disparity in assessed value between the taxpayer's property and similarly situated property. It held that the intentional, systematic undervaluation of such other property unfairly deprived the taxpayer of its rights under the Equal Protection Clause. Finally, the court held that the offended taxpayer was not, in attacking the discrimination, limited to seeking an upward revision of the taxes for the other members of the class, but could seek a downward adjustment of its own property. Id. at 344-346, 109 S.Ct. at 638-639, 102 L.Ed.2d at 697-699.

Similarly, in *Boothe Financial Corp. v. Lindley* (1983), 6 Ohio St. 3d 247, 6 OBR 315, 452 N.E.2d 1295, paragraphs one and two of the syllabus, we held:

"1. A taxpayer, although assessed at not more than true value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others. (*Southern Railway Co. v. Watts*, 260 U.S. 519 [43 S.Ct. 192, 67 L.Ed. 375], followed.)

"2. A taxpayer who leases equipment is denied equal protection when a competitor, who manufactures and leases essentially identical equipment, is allowed to grossly undervalue his property by reporting the value of his equipment at manufacturing cost less depreciation, and the former is not allowed to report the value of equipment in the same manner."

According to the opinion, Boothe Financial purchased computer equipment from IBM and leased it to customers. Boothe Financial, according to the commissioner's ruling, had to value the equipment at acquisition cost less depreciation. IBM, which also leased its manufactured equipment to others, based its true value on its manufacturing cost less depreciation, which produced a lower valuation than for Boothe Financial. Under these facts, we concluded that Boothe Financial was denied equal protection.1

In this case, MCI argues that it owns or leases equipment similar to that owned or leased by resellers. This equipment includes switches, telephone processing equipment, and general office equipment. The only distinction between MCI and resellers is that MCI, a facility-based carrier, owns or leases the transmission equipment while resellers lease WATS lines from other interexchange carriers. However, MCI urges, this is a distinction without a difference, since resellers essentially lease a portion of the interexchange companies' transmission equipment in leasing WATS lines.

To counter this, the commissioner argues that resellers, unlike "telephone companies," do not own or lease the transmission equipment but merely buy and resell transmission service from companies that own transmission equipment.

However, the Public Utilities Commission treats facility-based carriers and resellers the same. The commissioner's argument ignores the commission's April 9, 1985 order in *In re Regulatory Framework for Telecommunication Serv. in Ohio* (1985), 66 P.U.R.4th 572, No. 84-944-TP-COI, which determined that resellers transmit telephonic messages as a "telephone company" within the meaning of that term as contained in the Tax Code in the disputed year. Compare former R.C. 5727.01(E)(2) with 4905.03(A)(2). Moreover, the commission held that facility-based carriers and resellers are in the same interexchange carrier category, and the commission regulates both in the same

manner. The commission requires both to be certified by the commission, and both to set their rates flexibly within the range approved by the commission. The commission applies virtually all other oversight procedures to both carriers.

Thus, two taxpayers within the same class owning or leasing the same type of equipment are treated differently, and this treatment denies MCI equal protection of the laws. As MCI argues, it should have its equipment valued as general business property under R.C. Chapter 5711 rather than as public utility property under R.C. Chapter 5727. This treatment would result in MCI's equipment being assessed at thirty-one percent of true value, the assessment rate for 1987, and situsedaccording to its physical location under R.C. Chapter 5711.

Moreover, *GTE Sprint Communications Corp. v. Wisconsin Bell, Inc.* (1990), 155 Wis. 2d 184, 454 N.W.2d 797, supports this result. In that case, the Wisconsin Supreme Court held that a statute that imposed a retail sales tax on furnishing local-access-carrier telephone services to an inter-LATA carrier denied equal protection to that inter-LATA carrier because the state did not impose the tax on furnishing the same services to, inter alia, a reseller of the telephone services. The court decided that "[e]qual protection requires that because each [is] similarly situated, if the transfer of access services to inter-LATA carriers is to be taxed, the same transfer to local exchange carriers and resellers must be taxed as well. See Allegheny [488 U.S. at 345], 109 S. Ct. [at] 638-39 [102 L.Ed.2d at 698]. To the extent that inter-LATA carriers 'use or consume' access services in providing telecommunication services to their customers, so do interexchange carriers and resellers. The effect of the legislation here is to treat similarly situated persons disparately without a rational basis to support the distinction." Id., at 198, 454 N.W.2d at 803.

Since we hold that the commissioner denied MCI equalprotection on the above basis, we will not address MCI's remaining equal protection claims. Moreover, with this holding,

MCI's equipment will be sitused under R.C. Chapter 5711 to the taxing districts where located. Consequently, the situsing issue is moot, and we will not address the commissioner's cross-appeal.

Accordingly, we hold that the commissioner denied MCI equal protection by overvaluing MCI's property vis-a-vis the property of resellers. Therefore, we reverse the decision of the BTA and remand the cause for further proceedings consistent with this opinion.

Decision reversed and cause remanded.

A.W. Sweeney, Wright, Resnick and Pfeifer, JJ., concur. Moyer, C.J., Douglas and F.E. Sweeney, JJ., dissent.

FOOTNOTE:

1 The commissioner responded to that decision by requiring manufacturer-lessors to record the leased equipment at the price at which the property would be sold outright to the lessee prior to the commencement of the lease payments. Ohio Adm. Code 5703-3-31.

BOARD OF TAX APPEALS
STATE OF OHIO

MCI Telecommunications Corporation,

Appellant,

vs.

Case No. 88-G-1137

Joanne Limbach,
Tax Commissioner of Ohio,

Appellee. (PUBLIC UTILITY TAX)

DECISION AND ORDER

Filed June 12, 1992

APPEARANCES:

For the Appellant - Jones, Day, Reavis & Pogue
By: John C. Duffy, Jr. Esq.
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114

and

Jones, Day, Reavis & Pogue
By: Timothy B. Dyk
Metropolitan Square
1450 G. Street, N.W.
Washington, D.C. 20005

and

MCI Telecommunications Corporation
By: Douglas A. Richards
and Walter Nagel
1133 19th Street, N.W.
Washington, D.C. 20036

For the Appellee - Lee I. Fisher
Attorney General of Ohio
By: James C. Sauer
and Barton A. Hubbard
Assistant Attorneys General
State Office Tower - 16th Floor
30 East Broad Street
Columbus, Ohio 43215-3428

and

Lee I. Fisher
Attorney General of Ohio
Ann Henkener
Assistant Attorney General
Public Utilities Sction
180 East Broad Street
Columbus, Ohio 43215

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein under date of December 19, 1988, by counsel for the above-named appellant from Certificates of Determination of the Tax Commissioner dated November 10, 1988, wherein said official affirmed public utility personal property tax assessments relating to the tax year 1987.

The Tax Commissioner's final order is incorporated herein by reference. The appellant's notice of appeal reads, in pertinent part, as follows:

> "MCI complains of the following errors in the final determination issued by the commissioner:
>
> "1. The Commissioner erred in failing to find that the method employed to determine the true value of MCI's taxable property resulted in a determination of true value which is in excess of the true value in money for its taxable property.
>
> "2. The Commissioner erred in failing to find that the true value of MCI's taxable tangible personal property situated in Ohio was as set forth in the appraisal report submitted by MCI.
>
> "3. The Commissioner failed to apportion the taxable value of MCI's taxable property among the taxing districts in Ohio in accordance with *Ohio Rev. Code* section 5727.15(A).
>
> "4. The requirement in *Ohio Rev. Code* section 5727.10 that the Commissioner assess MCI's taxable property for taxation based on its true value results in MCI's taxable property being assessed in a manner that denies it equal protection of the laws in violation of the United States Constitution and the Ohio Constitution.
>
> "5. The failure of the Commissioner to assess MCI's taxable property for taxation at the assessment percentage prescribed in *Ohio Rev. Code* section 5711.22 results in a denial of equal protection of the laws to MCI in violation of the

> United States Constitution and the Ohio Constitution."

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript furnished by the Tax Commissioner, the testimony and evidence presented at the hearing before this Board, and the briefs of counsel.

At the outset, we note that the appellant, at the hearing and in its brief, withdrew the specifications of error numbered one and two in the notice of appeal relating to the determination of true value for its taxable property. Therefore, the testimony and evidence submitted at the hearing was restricted to the apportionment and constitutional issues raised in the notice of appeal.

Further, although this Board received the testimony and evidence relative to the constitutional issues raised, the parties did not brief the issues since the Board of Tax Appeals lacks jurisdiction to decide the issues. See *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229. Therefore, the only remaining issue presented for resolution is whether the Tax Commissioner properly apportioned the taxable value of MCI's taxable property among the taxing districts in Ohio.

R.C. 5727.15 sets forth the methodology for apportionment of value of property of public utilities, and during the audit period read in pertinent part, as follows:

> "When all the taxable property of a public utility, except the kind mentioned in section 5709.02 of the Revised Code, is located in one taxing district, the tax commissioner shall apportion the total value thereof to that taxing district.

"When taxable property of a public utility, except the kind mentioned in section 5709.02 of the Revised Code, is located in more than one taxing district, the commissioner shall apportion the total value thereof between the taxing districts as follows:

"(A) In the case of telegraph or a telephone company, the value apportioned to each taxing district shall be the same percentage of the total value apportioned to all taxing districts as the miles of wire owned by the company within the taxing district are to the total miles of wire owned by the company within this state;

* * *

"(E) In the case of all other public utilities, the value of the property to be apportioned shall be apportioned to each taxing district in proportion to the entire value of such property within this state."

The facts of the case are generally undisputed. The appellant first filed an annual report as a telephone company for public utility purposes starting tax year 1983. For the 1983 through 1985 tax years the appellant provided telephonic service through a microwave transmission system. The appellant owned no wire during these tax years. Since R.C. 5727.15 requires that the taxable value of a telephone company's property be apportioned by a "wire mileage" formula, and the appellant had no wire mileage, the Tax Commissioner apportioned the taxable value situsing the property to the district where the microwave property was physically located. MCI reported the cost of the property which was located in each taxing district.

For tax year 1986, MCI filed an annual report indicating they had installed and placed into operation a fiber-optic cable

route along with the microwave equipment. The microwave property was still apportioned as to where it was physically located. The fiber-optic cable was apportioned based on wire miles.

The above enunciated apportionment method used by the Tax Commissioner for tax years 1983 through 1987 was not challenged by MCI through applications for review and redetermination. The total taxable value of the property for the tax years involved is as follows:

1983 -	$29,517,410
1984 -	$45,717,600
1985 -	$62,770,700
1986 -	$93,187,200

(Note: For 1986 $79,425,590 was microwave and $13,761,610 was fiber-optic)

For the tax year in issue, 1987, the appellant's taxable property was apportioned using the same methodology employed for 1986. The appellant claims that the alternative apportionment method used by the Tax Commissioner is contrary to the clear mandate in R.C. 5727.15 and therefore contrary to law. The appellant claims that the total value of its taxable property, including the microwave equipment must be apportioned among the taxing districts using the "wire mileage" formula.

The Tax Commissioner claims that since the majority of appellant's taxable property is wireless it is both reasonable and lawful to apportion the wireless microwave property to the taxing districts where it is actually located, rather than only to the taxing districts where MCI's wire property is located. The Tax Commissioner argues that the literal words of the statute referring to wire miles should be given a reasonable interpretation to include wireless property which transmits telephonic messages. The Tax Commissioner points out that absent such an

interpretation, for the tax years 1983 through 1985, when MCI had no "wire miles" the statutory apportionment methodology was incapable of being applied to MCI's taxable property. Therefore, the Tax Commissioner interpreted the statute to mean that "non-wire" transmission equipment used for the same purpose as "wire" property should be apportioned to the taxing district where it is located.

The Tax Commissioner cites several cases in support of the proposition that the statute must be interpreted in order to effect the General Assembly's legislative intent. In *Timken Co. v. Lindley* (1985), 17 Ohio St. 3d 85, the Court held that the function of a particular device, rather than its form, is paramount in determining whether it qualifies for exemption. At issue in *Timken* was an exemption for patterns, jigs, and dies. The Board of Tax Appeals, employing definitions that stressed function over form, exempted certain devices as patterns, jigs and dies. The Ohio Supreme Court affirmed this Board's decision and stated:

> "Present state of the art engineering techniques have resulted in the development of advanced machines and devices. Such implements as modern patterns, jigs and dies have become more sophisticated and do not necessarily resemble, in form, their antiquated counterparts. However, the essential function of these devices has not changed. To apply rigid, standard dictionary definitions when examining a particular item would ignore all advancements in manufacturing. More flexible definitions, with emphasis on function and use rather than physical form, must be adopted. The Board of Tax Appeals has applied such definitions in the present case."

Likewise, the Tax Commissioner argues that the alternative methodology employed recognizes the changing technology of the

telecommunications industry which is not addressed by the statute in referring only to "wire miles". The literal words of the statute do not address MCI's situation.

Further, the Tax Commissioner contends that R.C. 5727.15 should be interpreted in light of the purpose of the General Assembly in enacting the legislation. In *Gulf Oil Corp. v. Kosydar* (1975), 44 Ohio St. 2d 208, the syllabus states:

> "2. If the construction and interpretation of statutory language reveals the statute to be facially ambiguous, it is the function of the courts to construe the statutory language to effect a just and reasonable result."

In *Canton v. Imperial Bowling Lanes* (1968), 16 Ohio St. 2d 47, the syllabus states:

> "4. The General Assembly will not be presumed to have intended to enact a law producing unreasonable or absurd consequences. It is the duty of the courts, if the language of a statute fairly permits or unless restrained by the clear language thereof, so to construe the statute as to avoid such a result. (*State, ex rel. Cooper v. Savord,* 153 Ohio St. 367, followed.)"

And in *Lakewood Homes v. Bd. of Adjustment* (1971), 25 Ohio App. 2d 125, the syllabus states:

> "4. It is the duty of a court in construing the acts of legislative bodies to avoid unreasonable, absurd or ridiculous consequences."

In apportioning MCI's microwave property to the taxing districts where it is physically located, and apportioning the fiber-optic

cable by the "wire mileage" formula, the Tax Commissioner maintains that the statute is construed and applied to effect a just and reasonable result.

The appellant, MCI, contends that R.C. 5727.15 is unambiguous and requires no interpretation. Appellant cites *Sears v. Weimer* (1944), 143 Ohio St. 312, wherein the syllabus states:

> "5. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted."

Further, at page 316 the Court states:

> "In the case of *Slingluff v. Weaver,* 66 Ohio St. 621, 64 N.E., 574, it was held:
>
> 'But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.' See, also, *State v. William,* 104 Ohio St., 232, 240, 135 N.E., 651.

"As stated in 37 Ohio Jurisprudence, 514, Section 278:

> 'Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation. *To interpret what is already plain is not interpretation, but legislation, which is not the function of the courts, but of the general assembly.* *** An unambiguous statute is to be applied, not interpreted.' (See, also, ibid, 488, 490, Sections 267, 268.)"

(Emphasis added by Board of Tax Appeals)

See also *Revesz v. Doehler Jarvis* (1968), 14 Ohio App. 2d 156.

Additionally, the appellant points out that this Board has previously considered cases involving application of R.C. 5727.15, wherein the Tax Commissioner adopted an alternative apportionment formula either by rule or administrative practice. In *Condee v. Lindley* (1984), 12 Ohio St. 3d 90, the Court affirmed the Board of Tax Appeals decision that the Tax Commissioner's alternate apportionment formula was arbitrary, unreasonable, and therefore invalid. *Condee* involved apportionment of personal property of electric companies pursuant to R.C. 5727.15. The electric companies reported the value of situsable property at seventy percent of its true taxable value and the remaining thirty percent as part of the total non-situsable property value pursuant to an informal instruction of the Tax Commissioner. The "seventy-thirty split" was employed as a matter of administrative policy. In finding the alternate apportionment formula invalid the Court stated:

"The commissioner asserts that he has acted under the mandate of and in compliance with, R.C. 5727.15(B) in instructing public utilities to report their situsable property values using the 'seventy-thirty' formula. R.C. 5727.15(B) provides in relevant part:

'When the property of such public utility is located in more than one county in this state, the assessed value of such property, except that mentioned in section 5709.02 of the Revised Code, shall be apportioned by the commissioner between the several counties and the taxing districts therein in the proportion which the property located in such county and taxing district bears to the entire value of the property of such public utility, valued as provided in sections 5727.01 to 5727.62 of the Revised Code, so that to each county and each taxing district therein there shall be apportioned such part of the entire valuation as will fairly equalize the relative value of the property therein located to the whole value of the property. ***'

"The commissioner argues that the 'seventy-thirty' formula apportions utility valuations so that each county and tax district is assigned 'such part of the entire valuation as will fairly equalize the relative value of the property therein located to the whole value of the property.' The commissioner then posits that since the 'seventy-thirty' formula fulfills the statutory apportionment directive, the formula itself is a valid administrative policy. The commissioner's proposition, however, does not address the true issue at hand. Though the policy adopted by the commissioner may arguably meet the statutory

> apportionment requirement, the question presented is whether the Department of Taxation may employ such a policy without benefit of a formally promulgated rule. We find that it may not.
>
> * * *
>
> "The rulemaking requirements set forth in R.C. Chapter 119 are designed to permit a full and fair analysis of the impact and validity of a proposed rule. We cannot determine in good faith, solely on the basic of the appellant commissioner's briefs in the instant case, that the 'seventy-thirty' formula is an equitable and valid rule. If the commissioner desires to continue application of the policy in question, only compliance with R.C. Chapter 119 and R.C. 5703.14 may permit him to do so."

Further, the Court rejected the Tax Commissioner's argument that the policy should be upheld since it had been in place since 1969.

Following the holding in *Condee*, *supra*, this Board in *Stone v. Limbach* (June 30, 1988), B.T.A. Case No. 85-C-931, unreported, determined that the Tax Commissioner's informal administrative policy classifying electric companies' taxable property as either situsable or non-situsable and apportioning pursuant to the distinction drawn thereto, constituted a rule, and as such was void as not properly promulgated pursuant to the rule making procedures set forth in R.C. Chapter 119 and R.C. 5703.14.

More recently in *Ryland v. Limbach* (March 22, 1991), B.T.A. Case Nos. 88-J-974, 88-D-980, and 88-G-986, unreported, which involved apportionment pursuant to R.C. 5727.15 of a gas companies pipeline property, this Board determined that the Tax Commissioner's alternate apportionment formula, an informal

policy since at least 1979, similar to the policy in *Stone*, was invalid due to lack of statutory authorization or a properly promulgated rule. We further held that although R.C. 5727.15 was subsequently amended to authorize the use of the 70/30 split for electric company property beginning in 1986, said authorization did not extend to the pipeline property in issue. The legislature did not include pipeline companies within the purview of Am. Sub. S.B. 192, passed by the 116th General Assembly, effective December 31, 1985, and this Board would not broaden the scope of the amendment where the legislature chose not to do so.

In the present case the record reflects there was no formal rule or written policy in effect for tax years 1983 through 1987. There existed merely an understanding in the Public Utility Tax section of the Tax Department what the apportionment methodology was.

Although we agree with the Tax Commissioner's contention that the function of the microwave property is the same as the fiber-optic cable, that is, to provide telephonic service, the statute clearly specifies wire miles. as in *Condee*, *supra*, this Board does not make a finding whether the policy meets the statutory apportionment requirements, but we find such policy may not be employed without the benefit of a formally promulgated rule.

Also, we find the Tax Commissioner's reliance on the first paragraph of R.C. 5727.15 to be misplaced. All of the taxable property of MCI is not located in one taxing district. The microwave towers are located in various taxing districts, therefore the total value of the microwave property cannot be apportioned to one taxing district.

We are cognizant of the effects of apportioning the total taxable value of all of MCI's taxable property to only those taxing districts with fiber-optic cable, however the statute is clear and

unambiguous in its terms. MCI had wire miles for tax year 1987 allowing application of the statute. Moreover, as stated in appellant's brief, R.C. 5727.15(A) has been amended several times during the 1980's, has been amended several times during the however the Tax Commissioner has not sought an amendment to R.C. 5727.15 regarding apportionment provisions for telephone companies to accommodate the changes in technologies.

Therefore, giving full consideration to the entire record in this matter, the statutes and applicable case law, and the findings of this Board, it is the decision and order of the Board of Tax Appeals that the final order of the Tax Commissioner regarding the apportionment is hereby reversed. It is ordered that this cause be remanded to the Tax Commissioner to give effect to this decision and order. On remand the Tax Commissioner is instructed to reapportion the total taxable value of the taxable personal property of the appellant, MCI, in conformity with R.C. 5727.15, as set forth in this decision and order, and to certify the corrected taxable values to the proper officials in the counties where the apportionment result in a change in the taxable values.

It is further ordered that certified copies of this Decision and Order be sent to the county auditors of each of the counties to whom certificates of taxable value have been sent previously by the Tax Commissioner, as set forth in the transcript filed in this case.

As a final matter, on December 16, 1991, counsel for the appellee Tax Commissioner fled herein a "Motion to Seal Record". Said motion reads as follows:

> "Pursuant to O.A.C. 5717.1-11, the appellee Tax Commissioner moves the Board of Tax Appeals for an order sealing that portion of the record which includes Exhibits 13, 17, and 18 and prohibiting the parties from any use or disclosure of such exhibits, except in connection with the proceedings in which their production

> was ordered or any appeal from a decision and order of the Board in such proceedings. The reasons for such motion are set forth in the attached memorandum which is incorporated herein by reference."

No memorandum in opposition to the motion has been filed.

The memorandum in support of motion cites the necessity to protect the confidentiality of the information contained therein. Upon consideration of the motion and the record in this matter, we find said motion is well taken and should be granted. See: *General Mills, Inc. v. Limbach* (May 3, 1991), B.T.A. Case No. 83-G-39, unreported.

It is the order of the Board of Tax Appeals that the portion of the record which includes Exhibits 13, 17, and 18 in the above-styled matter be sealed, and the parties are prohibited from using or disclosing same except in connection with these proceedings or on further appeal.

> I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.
>
> /s/ Kiehner Johnson, Chairman

THE SUPREME COURT OF OHIO

1994 TERM

To wit	:	March 9, 1994
MCI Telecommunications Corporation, Appellant/Cross-Appellee,	:	Case No. 92-1199
v.	:	REHEARING ENTRY
Joanne Limbach [Roger W. Tracy], Tax Commissioner of Ohio, Appellee/Cross-Appellant.	:	(Board of Tax Appeals)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Board of Tax Appeals No. 88G1137)

/s/THOMAS J. MOYER
Chief Justice

In the Matter of the Commission Investigation into the Regulatory Framework for Telecommunication Services in Ohio

84-944-TP-COI

PUBLIC UTILITIES COMMISSION OF OHIO

1985 Ohio PUC LEXIS 44; 66 P.U.R.4th 572
April 9, 1985

PANEL:
[*1]

Thomas V. Chema, Chairman; William H. Brooks; Gloria L. Gaylord; Ashley C. Brown; Alan R. Schriber

OPINION AND ORDER

The Commission, coming now to consider the above-entitled matter, having reviewed all comments and reply comments submitted in this docket, and having determined that this matter should proceed directly to Opinion and Order without the need for public hearings, hereby issues its Opinion and Order.

OPINION:

I. Procedural Background:

By Entry issued August 21, 1984, the Commission initiated the above-captioned docket to consider certain jurisdictional matters raised in the context of several of the interexchange carrier certification proceedings and the cellular certification cases. In those proceedings, the argument had been made that because the applicants owned no facilities in Ohio, they did not fall within the definition of a telephone company as set forth in Section 4905.03, Revised Code. The Commission concluded in Finding (3) of its Entry that the definition of a telephone company does not turn

solely on the issue of the ownership of facilities, and stated that "(A)ny company which offers to the public any form of telecommunications service [*2] is a 'telephone company' within the meaning of Section 4905.03, Revised Code, and is therefore a public utility within the meaning of Section 4905.02, Revised Code, subject to the Commission's jurisdiction." Recognizing that the current statutory framework for the regulation of telephone companies did not contemplate the types of non-traditional "telephone companies" which may be encompassed by such a definition, the Commission called for comments from any interested persons relative to whether the Commission should exercise its jurisdiction in regulating the various types of non-traditional "telephone companies" in a manner different from its traditional regulatory practice, and solicited suggested legislative changes with respect to the regulation of such "telephone companies." The comment period, as extended by Entry dated September 19, 1984, ran until October 31, 1984 for initial comments and until November 15, 1984 for reply comments.

On September 19, 1984, ALLTEL Communications Corporation (ALLTEL) filed an Application for Rehearing to the Commission's August 21, 1984 Entry, alleging that the Commission erred in finding that ALLTEL is subject to its jurisdiction, because ALLTEL [*3] is not engaged in the business of transmitting telephonic messages to, from, or through the state of Ohio, and is therefore not a telephone company within the meaning of the Ohio Revised Code. The Ohio Bell Telephone Company filed a Memorandum Contra ALLTEL's Application for Rehearing on September 28, 1984. On October 9, 1984, the Commission issued its Entry on Rehearing, finding ALLTEL's arguments to be without merit and denying ALLTEL's Application for Rehearing. In so doing, the Commission noted that while it had set forth in its August 21, 1984 Entry the statutory definition of a telephone company, it had in no way made a specific jurisdictional determination with respect to any particular company.

Initial comments were timely filed on behalf of the following interested persons: The Utilities Telecommunications Council; The Central Committee on Telecommunications of the American Petroleum Institute; MCI Telecommunications Corporation; Satellite Business Systems; AT&T Communications of Ohio, Inc. (AT&T); GTE Sprint Communications Corporation (GTE Sprint); United States Transmission Systems, Inc.; ALLTEL; Qwest Microwave VII, Inc. (Qwest Microwave); Lexitel Corporation (Lexitel) [*4] and U.S. Telephone, Inc. (U.S. Tel); Allnet Communications Services, Inc.; TMC Management Services; Shared Use Network, Ltd.; United Telephone Company of Ohio (United); Cincinnati Bell Telephone Company (Cincinnati Bell); The Ohio Bell Telephone Company (Ohio Bell); General Telephone Company of Ohio (General); ALLTEL Ohio, Inc., The Elyria Telephone Company, and The Western Reserve Telephone Company; Central Telephone Company of Ohio; The Ohio Telephone Association; Ameritech Mobile Communications, Inc.; GTE Mobilnet, Inc.; Southern Ohio Telephone Company; ALLTEL Mobile Communications of Ohio, Inc.; Digital Paging Systems of Cleveland, Inc. and Radio Relay-Ohio; and The Ohio Association of Radio Common Carriers.

Reply comments were filed on November 15, 1984 on behalf of the following interested persons: The Utilities Telecommunications Council; The Central Committee on Telecommunications of the American Petroleum Institute; AT&T; GTE Sprint; Qwest Microwave; Lexitel and U.S. Tel; United; Cincinnati Bell; Ohio Bell; General; The Ohio Telephone Association; The Ohio Association of Radio Common Carriers; United Telespectrum, Inc.; Multicom, Inc.; and the Office of Consumers' Counsel. [*5] Litel Telecommunications Corporation filed reply comments on November 21, 1984, after being granted an extension of time.

On November 13, 1984, a Motion to Divide Consideration of Issues was filed on behalf of the Ohio Association of Radio Common Carriers (ORCC). In that motion, ORCC requested that the Commission separate by means of a subfile designation those

issues pertaining to conventional and cellular radio common carriers from those issues pertaining to other Ohio telephone company entities. ORCC further requested in its filing that should the Commission set prehearing conferences or public hearings in this matter, a separate proceeding should additionally be scheduled to consider those issues pertaining to radio common carriers. United and Ohio Bell filed responses to ORCC's motion on November 28, 1984 and December 3, 1984, respectively.

After carefully reviewing all comments submitted in this case, the Commission finds it appropriate and necessary at this time to render its decision without public hearings in this matter. Having made that determination, the Commission finds it unnecessary to rule on ORCC's Motion to Divide Consideration of Issues.

The comments filed in this docket, while representing varying interests, exhibit almost unanimous agreement that the evolving competitive environment in certain parts of the telecommunications industry necessitates regulation in a manner different from the Commission's traditional regulatory practice, which was created in response to a monopolistic environment. Similarly, there emerges in the comments a broad consensus that this new form of regulation should trend toward a relaxation of existing regulatory requirements. As General points out in its reply comments, however, there is a clear polarity of opinion among those filing comments as to the manner in which a streamlined regulatory approach should be applied. One body of opinion, represented by AT&T and the majority of the local exchange companies, is that the introduction of competition and subsequent revised regulatory procedures be approached by specific services/ markets and that the resulting regulatory treatment of such services should be the same for all providers of the service. The opposing view, represented by most of the interexchange carriers, argues that revised regulatory treatment should be granted to individual [*7] providers of telecommunications services based upon each provider's market share, with those having a dominant market share being regulated more strictly than those with a nondominant

share.

As for suggested legislative changes, while many of those filing comments made specific suggestions relating to the recognition of a competitive telecommunications environment, most maintain that the Commission has sufficient legislative authority pursuant to present sections of the Ohio Revised Code to effect regulation of the various types of emerging telephone companies in a manner different from traditional regulatory practice. In support of their assertion, they point to the broad language of the Commission's enabling statute, Section 4901.02, Revised Code, which states:

The Commission shall possess the powers and duties specified in, as well as all powers necessary and proper to carry out the purposes of Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code.

(Emphasis Added.) In addition, they reference the ample discretion granted by other sections of Title 49 of the Ohio Revised Code, such as Section 4905.04, Revised Code, which vests the Commission "with [*8] power and jurisdiction to supervise and regulate public utilities", and Section 4905.06, Revised Code, which delegates to the Commission "general supervision over all public utilities within its jurisdiction".

After carefully considering the various views espoused by those who commented in this docket, in concert with the Commission's concerns for the public interest, this Commission concludes that it should exercise its jurisdiction over certain segments of the telecommunications industry in a manner different from its traditional regulatory practice. The fundamental theory underlying this Commission's traditional regulation of telephone utilities is based on the premise that telephone utilities are natural monopolies; and because they are natural monopolies, they are not constrained by the forces of the market in setting rates or managing the company. The technological revolution of the past decade, in conjunction with several actions taken at the federal level, however, has spawned a new era in telecommunications.

Many segments of the telecommunications industry are no longer characterized by a monopolistic marketplace; rather, they are characterized by a burgeoning of firms [*9] ready, willing, and able to enter into the telecommunications marketplace. As an example, this Commission has granted in the past year interim authorization to approximately twently interexchange carriers, all of whom are competing for the Ohio intrastate long distance telephone market. In such a competitive environment, the premise of traditional regulation is no longer relevant; the existence of competition generates market forces which replace the need for certain regulations which were developed to protect customers in the monopoly utility setting. This Commission, therefore, agrees with the various commenters in this docket, that the evolution of competition in certain segments of the telecommunications industry warrants it exercising its jurisdiction in regulating such segments in a more flexible and streamlined manner than traditional regulation. Such an approach will facilitate ease of entry into the marketplace, thereby promoting competition, while at the same time allowing the Commission to maintain the residuum of regulatory authority necessary to fulfill its responsibility to protect the public interest, and to reimpose full regulation should it become necessary. [*10]

Further, to insure effective competition and the flow of maximum benefits to the public, the Commission concurs with those who argue that such regulation should be applied equally to all providers of competitive telecommunications services. While the Commission is cognizant of the concerns expressed by some of the commenters with respect to telecommunications providers with a dominant market share, it believes that the forces of the marketplace, when coupled with the supervisory oversight of this Commission, will ensure a fair competitive telecommunications environment.

Finally, the Commission agrees with those who filed comments in this docket that its objectives can be accomplished within the present Ohio statutory framework. This conclusion as to the

Commission's flexibility in regulating utilities subject to its jurisdiction is fully consistent with the broad language of the Commission's enabling statute cited supra. Other statutes throughout Title 49 similarly grant to the Commission a large measure of discretion in determining "just and reasonable" rates (Section 4909.15, Revised Code), "adequacy of service" (Section 4905.22, Revised Code), and the "justness" and "reasonableness" [*11] of telephone company rules, regulations and practices (Section 4905.381, Revised Code). This broad statutory language, coupled with the underlying objective of such statutes of regulating in the public interest, leads this Commission to believe that it has broad latitude in adapting regulatory policy to take into account the changing circumstances of the telecommunications environment.

Consistent with the above conclusions, the following sections identify the appropriate regulatory requirements for various segments of the telecommunications industry.

A. Interexchange Carriers:

Included in this category are two types of long distance carriers: 1) facilities-based carriers, and 2) resellers of long distance service. There is no doubt that the operations of a facilities-based interexchange carrier, that is, a carrier which owns all or part of its transmission facilities, qualify it as a telephone company and a public utility within the meaning of the Ohio Revised Code. The status of a reseller of interexchange services to the public as a telephone company, however, is more controversial. Interexchange resellers, who for purposes of this docket are defined as carriers who [*12] lease WATS or WATS equivalent services from a facilities-based carrier and then remarket the services at a discount to business and residential customers, argue that because they do not own transmission facilities, they are not telephone companies within the meaning of the Ohio Revised Code. This Commission is not persuaded by that argument. While it is true that such resellers do not own or operate the actual transmission facilities involved in conveying telephonic messages,

they do operate switching and call processing equipment, used in transmitting telephonic messages from point A to point B. It follows, in this Commission's view, that interexchange resellers are "engaged in the business of transmitting telephonic messages" as defined by Section 4905.03, Revised Code, and are, therefore, telephone companies and public utilities subject to Commission jurisdiction.

Having determined that interexchange carriers, including interexchange resellers, are subject to Commission jurisdiction, and in light of the competitive market forces operating in the interexchange carrier market, the Commission hereby adopts the following guidelines for the regulation of interexchange carriers: [*13]

Certification. Certification shall be required for all interexchange carriers. The streamlined application process heretofore established by the Commission shall continue for future certification proceedings. An application for a certificate of public convenience and necessity should include, among other things, a copy of the applicant's articles of incorporation or partnership agreement; a list of the officers and directors or partners; a description of the applicant and its technical capability to provide the proposed service; a description of the proposed service; a detailed description of the proposed service area, including originating and terminating points within the state of Ohio; financial information, including a balance sheet and a pro forma income statement; and a proposed tariff. Once the application is received and found to be in proper form, the applicant will be directed to publish legal notice of the application in all counties affected by such application. The legal notice, which will be prescribed by the Commission, will give notice of the pendency of the subject certification application and will inform interested persons of the opportunity to file objections [*14] to the application and a request for hearing by a date certain. Absent a written statement showing good cause why the application should not be granted and an accompanying request for an oral hearing,

the Commission shall decide the matter based on affidavits. Of course, in reviewing objections raised by competitors, the Commission will carefully consider the basis for those objections, since a competitor may have incentive to delay a fellow-competitor's operations. The Commission's consideration in determining whether a certificate should be issued to a particular applicant will focus on the proper party status of the applicant, which includes, but is not limited to, the applicant's technical ability to provide the proposed service and the financial stability of the applicant. Applicants will not be required to demonstrate public convenience or need, so long as the Commission is convinced that competition in the interexchange market is properly serving the public interest.

Tariffs. In addition to examining the proper party status of an applicant, the Commission will review and approve proposed tariffs setting forth the rates and regulations pursuant to which the applicant [*15] will conduct its operations. Tariffs for interexchange service should be presented in the standard format currently used by telephone companies, in compliance with the requirements of Section 4905.30, Revised Code and 4901:1-5-04(A), Ohio Administrative Code (O.A.C.). *

* To the extent that interexchange carriers with provisional authority are operating pursuant to tariffs which have not yet been approved, and which, in many cases, are not in proper form, such carriers should file tariffs in accordance with the directives contained in the Commission's companion Entry signed on this same day.

With regard to the setting of rates, the Commission believes that, as long as competition is in place, interexchange carriers should be allowed a certain degree of pricing flexibility in order that consumer demand can be satisfied more effectively. At the same time, the Commission recognizes that because interexchange competition does not yet exist in all areas of the state of Ohio, too much flexibility could lead to the subsidization of highly

competitive markets by less competitive markets, to the detriment of some Ohio consumers. In an effort to balance the needs of the telecommunications [*16] industry against those of the public interest, the Commission finds it appropriate to handle rate proposals pursuant to the following guidelines:

Message toll service (MTS) tariffs for all interexchange carriers shall consist of rates not to exceed the current MTS rates approved by the Commission and set forth in Ohio Bell's P.U.C.O. No. 7 Message Toll Service Tariff. For customer-dialed station-to-station calls originating 8:00 a.m. to 5:00 p.m. Monday through Friday, the applicable maximums are as follows:

Mileage	Rate Initial Minute	Each Additional Minute
1 - 10	$ .32	$ .16
11 - 22	.40	.22
23 - 55	.48	.28
56 - 124	.57	.37
125 - end	.58	.39

For calls originating 5:00 p.m. to 11:00 p.m. Sunday through Friday, maximum rates equal to 60 percent of those listed above shall apply. For calls originating 11:00 p.m. to 8:00 a.m. any day, 8:00 a.m. to 5:00 p.m. any Sunday, and all day any Saturday, the maximum rates shall be 40 percent of those listed above. For calls originating on New Year's Day, Independence Day, Labor Day, Thanksgiving, and Christmas, the maximum rates shall be 60 percent of those listed above. The above rates shall [*17] represent maximums or "ceiling" levels, below which interexchange carriers may reduce or increase rates without prior Commission authorization. Discounting based upon originating exchange, terminating exchange and/or originating and terminating exchanges will be permitted provided it is uniformly available to all MTS customers within the designated exchange(s). Notice of any change in rates below the maximums, whether it be upward to downward, must be filed with the Commission in the form of a new pricing list, at least twenty (20) days prior to the effective

date. * In addition, interexchange carriers will be required to give to customers in the form of a bill insert prior written notice of any change effecting an increase in rates, at least twenty (20) days prior to the effective date.

* Pricing lists should be filed in triplicate with the Docketing Division under the case number in which the carrier's tariff was originally approved.

As for all service offerings other than MTS, interexchange carriers, at their discretion, will be permitted to file flexible rate schedules. Flexible rate schedules have an established minimum and maximum rate, with the rates applicable at [*18] any given point in time within the range of the minimum and maximum levels being set forth in pricing lists on file with the Commission. The maximum rate shall be no more than two times the minimum rate, unless sufficient justification can be shown for a deviation therefrom. A change in rates, either upward or downward, within the approved minimum and maximum levels will not require any action on the part of the Commission, because the prior approval of the minimum and maximum levels constitutes approval of each rate within the range. Notice of such changes must be filed with the Commission in the form of a new pricing list and with customers (if an increase in rates is involved) in the form of a bill insert, at least twenty (20) days prior to the effective date.

The Commission will not require the applicant to provide economic justification or cost support data for the proposed rates. If it appears to the Commission, however, based upon its own review or based upon comments of interested persons, that the proposed tariff or a portion thereof may be unjust and unreasonable, the Commission may require the applicant to make certain changes or provide further information, or may [*19] schedule the matter for hearing. In the event such a hearing is scheduled, the burden of proof is upon the applicant to show that the proposals contained in the tariff are just and reasonable.

If an interexchange carrier desires to increase the "ceiling" level for MTS rates, to increase the maximum level of a flex rate, or to increase any other non-flex rates or charges, Sections 4909.18 and 4909.19, Revised Code govern such applications.

Applications for tariff amendments, pursuant to Section 4909.18, Revised Code, which are not for an increase in rates, shall be filed in the form currently required for telephone companies. Examples of tariff amendments which would fall under this category include the addition of a new service offering or new classification of service, a change in classification of service, a change in a rule or regulation, a reduction in rates, a correction of an error, and various textual revisions without a change in intent. Such applications will be presumed to be just and reasonable, unless the Commission finds otherwise, and thus, will be allowed to automatically go into effect within forty-five (45) days of the filing, unless acted upon otherwise by the [*20] Commission. Promotional tariff offerings must be filed in writing with the Commission and shall be treated as applications not for an increase in rates, in accordance with the guidelines outlined in this paragraph, provided the company has a provision in its tariff which indicates that it may from time to time, upon approval of the Commission, engage in special promotions. For these purposes, the Commission considers a promotional tariff offering to be a trial service offering of limited duration (i.e. not to exceed thirty days per trial period) designed to attract new customers to a particular carrier or to increase an existing customer's awareness of a particular tariff offering of the carrier.

Any person seeking to challenge a tariff proposal contained in an application to amend a tariff pursuant to Section 4909.18, Revised Code, may file with the Commission a motion to suspend the effective date of such proposal no later than fifteen (15) days prior to the time the proposal would automatically go into effect. Such motion shall contain: a) a brief summary of the proposal or portion thereof challenged by the party and b) a statement showing good cause why such proposal should [*21] not be allowed to go

into effect. The Commission will suspend a proposal based upon motion of an interested person, only upon a showing that there is a high probability that such proposal, if allowed to go into effect, would substantially lessen competition for the provision of services to which such tariff proposal is applicable. The Commission may also suspend a tariff proposal, upon its own initiative, if it believes further investigation is necessary or appropriate to determine whether such proposal is just and reasonable.

The proper vehicle for challenging the reasonableness of rates, charges, rules and regulations which have already gone into effect for a particular company is a complaint case, pursuant to Section 4905.26, Revised Code.

Complaint Proceedings. The provisions of Section 4905.26, Revised Code shall apply to all telecommunications utilities providing interexchange service within the state of Ohio. If the Commission determines there are reasonable grounds for complaint, the matter will be set for hearing. The burden of proof in such a proceeding will be upon the complaining party.

Minimum Telephone Standards. Pursuant to Section 4905.231, Revised Code, [*22] the Commission promulgated standards of telephone service which it deems minimally acceptable. The Commission recognized in Case No. 83-869-TP-COI that the existing provisions of those minimum telephone service standards, as set forth in Chapter 4901:1-5, O.A.C., may no longer be appropriate in light of the vast changes taking place in the telecommunications industry, and therefore opened up that docket to consider revisions to those standards. The applicability of such minimum standards to competitive interexchange carriers will be assessed by the Commission in the context of that proceeding.

Annual Reports. Interexchange carriers shall file with the Commission, as required by Section 4905.14, Revised Code, an annual report, at such time and in such form as prescribed by the Commission.

Accounts. Interexchange carriers not engaged in the provision of interstate telecommunications services shall keep their accounts and records in accordance with Rules 4901:1-3-01 through 4901:1-3-04, O.A.C. Interexchange carriers which are engaged in the provision of interstate telecommunications services, as well as intrastate services, and under Federal Communications Commission (FCC) [*23] jurisdiction, however, shall keep their accounts in accordance with the system of accounts prescribed from time to time by the FCC for telephone companies subject to that Commission's jurisdiction, as provided in Rule 4901:1-3-05, O.A.C.

Issuance of Stocks, Bonds, and Notes. Sections 4905.40 through 4905.42, Revised Code govern the issuance of stocks, bonds, and notes by public utilities subject to this Commission's jurisdiction. Section 4905.40, Revised Code prohibits a public utility from issuing stocks, bonds, notes, or other evidences of indebtedness payable at periods of more than twelve months after their date of issuance unless the proceeds are used for one or more of the purposes specified in that statute and unless there is Commission approval. Basically, prior approval is required for all proposed issues of stock and most proposed issues of debt securities by a public utility where the purpose of the issuance is to finance capital improvements, to reorganize the capital structure, to refund certain obligations incurred, or to acquire the stock of another public utility. Recognizing, however, that interstate and multi-state interexchange carriers must be able to issue [*24] securities and raise money without the significant burdens associated with a detailed review by the Commission of each financing, the Commission, will upon petition of an interexchange carrier, consider exemption of that carrier from compliance with Sections 4905.40 through 4905.42, Revised Code. Such an exemption will be granted only upon a showing by the carrier that the bulk of its activities are interstate in nature, and further, that the requirement of obtaining Commission approval of the issuance of its securities would place an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution. [See

Panhandle Eastern Pipe Line Co. v. Public Utilities Commission, 56 O.S.2d 334, 383 N.E.2d 1163 (1978)].

Customer Deposits. Any interexchange carrier which requires a customer deposit to establish service shall comply with Chapter 4901:1-17, O.A.C. In addition to meeting the requirements of Chapter 4901:1-17, O.A.C., interexchange carriers will be required to place funds from customer deposits in an interest-bearing escrow account until such time as the deposit is refunded. * Customer deposits shall be refunded or credited to [*25] a customer's account upon the establishment of good credit in accordance with Rule 4901:1-17-06(B), O.A.C., upon termination of service by the customer, or upon abandonment of service by the company.

* The requirement to place funds from customer deposits in an interest-bearing escrow account is not applicable to radio common carriers or cellular carriers.

Expansion of Service Territory. An interexchange carrier wishing to expand its service territory beyond that which was authorized in its certification proceeding, must file with the Commission an application to amend its certificate. Such an application should include a detailed description of the proposed new service territory and supporting documentation indicating that the applicant is technically and financially able to conduct operations on an expanded basis. Applications to amend a certificate shall be treated in the same streamlined manner as applications for certification.

Abandonment of Service. Interexchange carriers desiring to abandon total operations in the state of Ohio or operations within a particular market area in Ohio must make an application for abandonment to the Commission in writing. Such [*26] application shall consist of an affidavit signed by two officers of the company [i.e., the President (or Vice-President) and the Secretary (or Treasurer)], stating the reasons for the proposed

abandonment and attesting that all customers have been notified in writing of the abandonment, and where applicable, have been refunded customer deposits in compliance with the above rules. Upon receipt of an application to abandon, the Commission will cause notice of the application to be given, as required by Section 4905.21, Revised Code. If, after proper notice has been affected, the Commission receives no written statement showing good cause why the application should not be granted, and further, if, after reviewing a company's application for abandonment, the Commission is satisfied that the proposed abandonment is reasonable, having due regard for the welfare of the public, it will grant the abandonment. If, on the other hand, the Commission finds that good cause has been shown not to grant the proposed abandonment or that the involved company has not complied with the above-mentioned rules regarding customer notification, customer deposits, or publication of legal notice, the Commission [*27] may schedule the matter for hearing and/or delay the granting of the abandonment until after full compliance has been accomplished by the company.

B. Radio Common Carriers:

Radio common carriers (RCCs) provide, on an interconnected basis, such services as one-way tone and voice paging, two-way tone and voice paging, display paging, and conventional two-way mobile telephone service (to be distinguished from cellular radio two-way mobile telephone service discussed below), and are telephone companies and public utilities for purposes of Sections 4905.02 and 4905.03(A)(2), Revised Code.

Due to technological developments which have occurred in the RCC industry and due to specific actions taken at the federal level to reduce the regulatory requirements applicable to RCCs, the RCC industry, like the interexchange carrier market, has become increasingly competitive. Accordingly, the Commission believes that the RCC industry should also be regulated with a light hand pursuant to the same guidelines outlined above for interexchange

carriers, where applicable. To the extent a radio common carrier which is operating pursuant to existing non-flex tariffs wishes to take advantage of [*28] a flexible pricing plan, it may file an application to amend its tariff to incorporate such a plan, provided the proposed maximum rate for current tariffed service offerings is no more than the current tariffed rate, or it may do so within the context of its next rate case.

C. Cellular Radio Carriers:

In 1981, the Federal Communications Commission acted to allocate spectrum to a revolutionary new form of two-way mobile radio telephone service called "cellular". In doing so, the FCC mandated a market structure by which there would be two carriers serving each geographic market area, one a wireline carrier and one a non-wireline carrier, each assigned a 20 MHz frequency block to use in establishing competing cellular systems. To further enhance competition, the FCC adopted a policy requiring that cellular carriers provide system capacity to non-affiliated resellers on a non-discriminatory basis.

There is no question that the operations of the underlying cellular carriers qualify them as telephone companies and public utilities subject to the jurisdiction of this Commission. A non-affiliated cellular reseller, however, would not fall under the statutory definition of a telephone [*29] company, since it does not "transmit telephonic messages to, from, through, or in this state." Resellers of cellular telephone service purchase a block of access numbers from the underlying carrier and resell their rights to use those numbers at a discount. Unlike interexchange carrier resellers, cellular resellers have virtually no technical involvement with any cellular telephone calls. They own no equipment fr routing or transmitting calls; they do not broadcast signals; they do not receive signals; and they do not convert any signals to land-line telephone transmission. Cellular resellers are engaged in the marketing of access numbers, not in the transmission of telephonic messages, and as such, are not telephone companies within the

meaning of the Ohio Revised Code. Likewise, cellular resellers which are affiliated with the underlying carrier do not, in this Commission's view, fall within the statutory definition of a telephone company, provided the affiliated reseller's operations (which consist of marketing of cellular service as opposed to the actual provision of cellular service) are maintained under a separate set of accounting records from the operations of the [*30] underlying carrier, and further provided the affiliated reseller has no involvement whatsoever in the wholesale operations of the underlying carrier (other than as a customer on equal terms as any non-affiliated cellular reseller).

Given the determination that cellular resellers are not subject to Commission jurisdiction, only the manner of regulation of the underlying cellular carriers is relevant. This Commission believes that the competitive nature of the cellular industry, as with conventional radio common carriers, obviates the need to apply the full force of its jurisdiction to cellular carriers. Therefore, to the extent the guidelines established for interexchange carriers in this Order are applicable, they shall also serve as the regulatory framework for cellular carriers.

D. Private Telecommunications Systems of Energy Utilities:

Many of Ohio's electric, gas, water and steam utilities (energy utilities) operate extensive telecommunications networks, comprised of privately-owned and operated microwave, fiber optic land mobile radio, and wireline telephone systems. There private communications systems are authorized by the FCC under Part 94 of its Rules and Regulations [*31] (See 47 C.F.R. Part 94). In addition, the FCC permits on a limited basis non-profit sharing of excess channel capacity of these private microwave facilities, pursuant to Section 94.17 of the FCC's rules, and is currently considering the issue of for-profit sharing of excess channel capacity of such private systems (See Notice of Proposed Rule Making, P.R. Docket No. 83-426, 48 Fed. Reg. 24,950).

Comments filed on behalf of the Utilities Telecommunications Council, representing the fifty-eight Ohio energy utilities, and the Central Committee on Telecommunications of the American Petroleum Institute, reveal that Ohio's energy utilities have come to rely heavily on the use of private telecommunications systems to meet the special requirements unique to their industry needs. In many instances, the use of "for hire" facilities are not available in the remote areas where exploration, production, and refining activities are often conducted. Even where "for-hire" services can be secured, the degree of reliability required to perform certain critical functions (e.g., control of compressor and pumping stations for safe and efficient operation, and provision of information concerning [*32] temperatures, rate of flow, pressures, alarms, etc.) cannot be achieved on telephone company facilities. Another motivation for energy utilities to construct private communications systems is the importance of having absolute control over vital circuits and other system elements, particularly in emergency situations such as nuclear accidents. Thus, while many energy utilities share their telecommunications networks to some extent on a non-profit, cost-sharing basis, the majority of these utilities construct and operate private networks to satisfy their own internal communications requirements.

Inasmuch as the private telecommunications systems operated by the energy utilities are neither configured nor operated to meet the telecommunications requirements of the general public or any discrete segments thereof, the Commission is of the opinion that energy utilities which share channel capacity on their private communications systems on a non-profit basis in accordance with Section 94.17 of the FCC's rules are not public utilities and telephone companies within the meaning of the Ohio Revised Code, and are therefore not subject to Commission jurisdiction. This Commission makes no [*33] finding herein, however, as to the status of energy utilities engaged in for-profit sharing of their private systems as public utilities and telephone companies. The Commission will address that issue when, and if, the FCC

renders a decision authorizing for-profit sharing of such networks on an unregulated basis.

As a final note, the Commission would emphasize that its decision with regard to private telecommunications systems of energy utilities is limited to the unique circumstances of such utilities, and should in no way be viewed as an indication that this Commission has reached a determination that other private networks, such as shared-tenant services, are not subject to Commission jurisdiction. Insofar as the comments filed in this docket did not address any other types of private networks, this Commission believes that further information is needed before a determination can be made with respect to such other networks. It, therefore, intends to issue a separate entry subsequent to the issuance of this Order inviting comments on specific issues surrounding shared-tenant services and resale of local exchange service.

E. Local Exchange Carriers:

While local exchange [*34] carriers have a limited monopoly to provide local exchange service, they are also involved in providing service offerings which are subject to competition (e.g., toll service). To the extent local exchange carriers are involved in lines of business which the Commission determines to be competitive, the Commission deems it appropriate to treat such competitive offerings in a more flexible manner than traditional regulatory practice.

In order that local exchange carriers providing interexchange services in competition with interexchange carriers can compete more effectively, such companies shall be treated in a manner similar to the interexchange carriers with respect to message toll service (MTS) tariffs. The current tariffed MTS rates for such local exchange companies shall represent maximums or "ceiling" levels, below which they may reduce or increase rates without prior Commission authorization. Notice of any change in rates

below the maximums, whether it be an increase or a reduction, must be filed with the Commission in the form of a new pricing list and with customers (only if an increase is involved) in the form of a bill insert, at least twenty (20) days prior to the effective [*35] date. Rate proposals exceeding the ceiling levels will still be subject to the provisions of Sections 4909.18 and 4909.19, Revised Code.

As for competitive service offerings other than MTS, any local exchange carrier which believes that a particular service offering it is now providing or one which it wishes to provide should be classified as a competitive offering, may file with the Commission an application to amend its tariff with respect to that offering, along with a memorandum stating sufficient reason to support a Commission finding that such offering should be so classified. In determining whether a specific offering in a particular market is sufficiently competitive, the Commission will consider several factors, including the number of carriers and affiliations providing the service offering; the geographic availability; the quality and quantity of services available; and other factors relevant to the public interest.

Local exchange companies, at their discretion, will be permitted to file proposed flexible rate schedules (with an established minimum and maximum) for service offerings, other than MTS, considered to be competitive. Until the Commission develops a methodology [*36] by which local exchange carrier expenses and revenues from monopoly offerings can be measured separately from those of competitive offerings, however, the Commission will require that the minimum level be supported by cost data, in order to insure that a local exchange carrier does not subsidize competitive offerings with its monopoly offerings. The maximum level shall be no more than two times the minimum level.

Upon application by a local exchange company to have an offering classified and treated as competitive, pursuant to the procedure established herein, the Commission will review for their

reasonableness the proposed tariff amendment and supporting memorandum within sixty days after the application is filed, and unless the Commission acts otherwise within that time period, the proposed tariff amendment will automatically go into effect. Insofar as local exchange companies are currently operating pursuant to tariffs approved by this Commission, this procedure must be limited to instances in which the local exchange carrier's application to amend its tariff does not involve a rate increase for a currently tariffed service offering. In other words, a local exchange carrier [*37] may avail itself of the streamlined procedure outlined above (assuming the Commission deems a particular offering competitive) only in instances which it desires to decrease the rate of a competitive offering which is already being offered pursuant to the company's tariff; or to file proposed rates for a new competitive service offering; or to institute a flexible pricing plan in which the proposed maximum rate for a tariffed competitive service offering is no more than the current tariffed rate. Should a local exchange carrier wish to increase the rate of a currently tariffed offering which is considered to be competitive, it must do so within the context of a general rate-making proceeding.

III. Conclusion:

In the past decade, dramatic changes have taken place in the telecommunications industry which have rendered the continuation of this Commission's traditional regulatory practices for certain segments of the industry obsolete. The regulatory procedures outlined above represent, in this Commission's view, more appropriate guidelines by which it can regulate those segments of the industry operating in a competitive marketplace. The Commission believes that the approach [*38] adopted herein will not only foster competition in the telecommunications industry, but will also allow the Commission to monitor the effectiveness of competition and to reimpose full regulation if the situation warrants.

The Commission would point out that the guidelines contained in the Discussion section of this Order are not intended to be a comprehensive list of the rules and procedures applicable to the various segments of the telecommunications industry. Rather, they are intended to be read in conjunction with the Ohio Administrative Code rules and the Ohio Revised Code sections which govern the regulation of telephone companies. Any applicable administrative rules or statutory sections not specifically discussed in this Order remain in full effect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1) By Entry issued August 21, 1984, the Commission initiated this docket to assist it in determining the appropriate regulatory framework for competitive telecommunications services in Ohio.

2) An opportunity was provided to interested persons to file comments relative to whether the Commission should exercise its jurisdiction in regulating the various types of non-traditional "telephone [*39] companies" in a manner different from its traditional regulatory practice, and to solicit suggested legislative changes with respect to the regulation of such "telephone companies." The initial comment period extended from August 21, 1984 until October 31, 1984, and the reply comment period ran until November 15, 1984.

3) Numerous comments and replies thereto were filed, and each has been fully considered by the Commission.

4) The fundamental theory underlying this Commission's traditional regulation of telephone utilities is based on the premise that telephone utilities, like gas, electric, and water utilities, are natural monopolies; and because they are natural monopolies, they are not constrained by the forces of the market in setting rates or managing the company.

5) Due to technological advancements and certain actions taken at the federal level, however, many segments of the telecommunications industry are no longer characterized by a monopolistic market place; rather, they are characterized by intense competition.

6) In such a competitive environment, the premise of traditional regulation is no longer relevant; the existence of competition generates market forces which [*40] replace the need for certain regulations which were developed to protect customers in the monopoly utility setting.

7) The evolution of competition in certain segments of the telecommunications industry warrants this Commission exercising its jurisdiction in regulating such segments in a more flexible and streamlined manner than traditional regulation.

8) Streamlined regulation should be applied equally to all providers of competitive telecommunications services in a particular market.

9) The existing statutory grant of authority to the Commission conveys sufficient discretion to provide for appropriate regulation in the new telecommunications environment.

10) The regulatory framework established for various segments of the telecommunications industry, as set forth in the Discussion section of this Opinion and Order, is deemed appropriate and should be adopted by the Commission.

11) Such framework shall remain in effect as long as the Commission finds that competition in the various segments of the telecommunications industry is fair and effective. Should the Commission determine that sufficient competition does not exist within a particular market or that such competition is [*41] ineffective, full regulation may be imposed.

ORDER:

It is, therefore,

ORDERED, That the regulatory framework established for various segments of the telecommunications industry, as set forth in the Discussion section of this Opinion and Order be, and hereby is, adopted. It is further,

ORDERED, That such framework shall remain in effect as long as the Commission finds that competition in the various segments of the telecommunications industry is fair and effective. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all Ohio local exchange telephone companies, the Ohio Telephone Association, all radio common carriers in the state of Ohio, the Ohio Association of Radio Common Carriers, all interexchange carriers who have received provisional authority from this Commission or who have applications pending for such authority, all cellular telephone companies who have received authority from this Commission or who have applications pending for such authority, the Utilities Telecommunications Council, the Central Committee on Telecommunications of the American Petroleum Institute, the Office of Consumers Counsel, and all other persons which have expressed [*42] an interest in this docket.

BEFORE THE BOARD OF TAX APPEALS

STATE OF OHIO

MCI TELECOMMUNICATIONS CORPORATION,	)	
Appellant,	)	
	)	CaseNo.88-G-1137
vs.	)	
JOANNE LIMBACH, TAX COMMISSIONER OF OHIO,	)	*AFFIDAVIT*
Appellee.	)	

I, James A. Witzel, as administrator of the Public Utility Tax Division, Ohio Department of Taxation, during the 1986 and 1987 calendar years from my personal knowledge, hereby aver and testify that:

1. For purposes of administering the Ohio tax laws for calendar year 1987, the Commissioner did not consider a person to be a "telephone company" within the meaning of O.R.C. Section 5727.01(E)(2) as that statute read immediately prior to the enactment of Am. Sub. H.B. No. 171 (eff. 7-1-87) unless such person was engaged in the business of transmitting telephonic messages to from, through, or in this state. As used in this Affidavit, the term "transmit" or "transmitting" means operating, either through ownership or lease, an integrated system of switching devices,

circuit equipment, transmission equipment such as transmitters, receivers, microwave radio equipment, coaxial, fiberoptic and other kinds of cable and wire, and associated equipment in a manner that would allow a telephonic message to be sent across intervening space or distances from its origination to its termination, or between its origination and its termination.

2. For purposes of administering the Ohio tax laws for calendar year 1987, the Commissioner did not conisder a person to be a "telephone company" within the meaning of O.R.C. Section 5727.01(E)(2) as that statute read immediately prior to the enactment of Am. Sub. H.B. No. 171 (eff. 7-1-87), but rather, considered such person to be a "taxpayer" within the meaning of O.R.C. Section 5711.01(B) when such person

a. was primarily engaged in the business of acquiring long distance telephone service from a company described in paragraph 1 of the Stipulation and reselling that long distance telephone service to its customers, and

b. did not operate, through ownership or lease, an integrated system of property as described in paragraph 1 of this Stipulation, used to transmit telephonic messages to, from through, or in this state.

/s/*JAMES A. WITZEL*

Subscribed to and sworn before me this *6th* day of *December*, 1991.

/s/*CYNTHIA E. CUMMINS*
Notary Public

My commission expires:
/s/ *May 20, 1996*
(Notary Seal)

Supreme Court, U.S.
FILED
AUG 8 1994
OFFICE OF THE CLERK

(3)

No. 93-1974

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

Of Counsel:
WALTER NAGEL
DOUGLAS A. RICHARDS
MCI TELECOMMUNICATIONS CORPORATION
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6216

TIMOTHY B. DYK
(Counsel of Record)
BETH HEIFETZ
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

JOHN C. DUFFY, JR.
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

21 pp

QUESTION PRESENTED

Whether assessing the property of a long distance carrier at 100% of value while assessing the property of its direct competitors at only 31% of value constitutes a denial of equal protection under the United States Constitution, amend. XIV, § 1.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
1. The Telecommunications Industry	2
2. The Ohio Personal Property Tax	3
3. The Discriminatory Treatment	5
4. The Proceedings Below	7
REASONS FOR DENYING THE WRIT	9
I. THE OHIO SUPREME COURT CORRECTLY CONCLUDED THAT DISCRIMINATION WITHIN THE CLASS OF LONG DISTANCE CARRIERS IS UNCONSTITUTIONAL	9
II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISIONS OF OTHER STATE SUPREME COURTS	12
III. IN ANY EVENT, THE DECISION BELOW IS CLEARLY CORRECT BECAUSE THE STATE DID NOT IN FACT APPLY THE DISTINCTION UPON WHICH IT NOW RELIES	14
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page

American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900) 13
Boothe Financial Corp. v. Lindley, 452 N.E.2d 1295 (1983), *cert. denied*, 464 U.S. 1057 (1984) 8, 12
Boston Real Estate Board v. Department of Public Utilities, 136 N.E.2d 243 (Mass. 1956) 14
Bosworth v. Pledger, 810 S.W.2d 918 (Ark.), *cert. denied*, 112 S.Ct. 617 (1991) 13
C. Thomas Stores Sales System v. Spaeth, 297 N.W. 9 (Minn. 1941) 14
Chesterfield Cablevision v. County of Chesterfield, 401 S.E.2d 678 (Va. 1991) 13
Citizens' Telephone Co. v. Fuller, 229 U.S. 322 (1913) 13
GTE Sprint Communications v. Wisconsin Bell, 454 N.W.2d 797 (Wis. 1990) 8, 14
Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937) 14
McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) 11, 12
Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985) 9, 12
Nordlinger v. Hahn, 112 S. Ct. 2326 (1992) 12
Ohio Oil Co. v. Conway, 281 U.S. 146 (1930) 9
Pacific Express Co. v. Siebert, 142 U.S. 339 (1982) 12
Snowden v. Hughes, 321 U.S. 1 (1944) 15
Southern Rwy. v. Watts, 260 U.S. 519 (1923) 9
State ex rel. Utilities Commission v. Southern Bell Tel. & Tel. Co., 363 S.E.2d 73 (N.C. Ct. App. 1987) 13
United States v. American Tel. and Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) 2, 3
United States v. MCI, 114 S. Ct. 2223 (1994) 11

TABLE OF AUTHORITIES—Continued

STATUTES	Page
Ohio Rev. Code Ann. § 5727.01(A) (Anderson 1986)	3
Ohio Rev. Code Ann. § 5727.01(E)(2) (Anderson 1986)	3
Ohio Rev. Code Ann. § 5727.01(E)(2) (Anderson Supp. 1988)	4
Ohio Rev. Code Ann. § 5727.06(C) (Anderson Supp. 1988)	5
Ohio Rev. Code Ann. § 5739.01(B)(3)(f) (Anderson Supp. 1988)	4
Ohio Rev. Code Ann. § 5739.01(B)(7) (Anderson Supp. 1988)	4
Ohio Rev. Code Ann. § 5739.01(AA) (Anderson Supp. 1988)	4
142 Laws of Ohio (Pt. II) 2342	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1974

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

At issue in this case is the application of Ohio's personal property tax to MCI Telecommunications Corporation ("MCI"), an interexchange (long distance) carrier.[1] Petitioner, the Ohio Tax Commissioner, assessed MCI's property at 100% of value. At the same time, the Commissioner assessed the property of other interexchange carriers, who are direct competitors of MCI, at only 31%

---

[1] The respondent in this case is MCI Telecommunications Corporation. Pursuant to this Court's Rule 29.1, following are the parent company, subsidiaries (except wholly-owned subsidiaries), and affiliates of respondent: MCI Telecommunications Corporation is a wholly-owned subsidiary of MCI Communications Corporation. MCI Network Technologies, Inc., QWest Properties, Inc., and Hines Ravinia III Limited Partnership are subsidiaries or affiliates of MCI Telecommunications Corporation.

of value. As a result, MCI was required to pay taxes in an amount essentially three times greater than that paid by others engaged in the same business. Based on these facts, the Ohio Supreme Court held that the Commissioner had violated the equal protection guarantees of both the Ohio and the United States Constitutions. The background of this case is as follows:

1. The Telecommunications Industry

In 1987, the sole tax year at issue, dozens of interexchange carriers operating in Ohio, including MCI, provided long distance service to their subscribers. (R. 650-660).[2] Each of these interexchange carriers had facilities and equipment, including switching devices, in the State that were essential to performing their function. (R. 305, 308, 310). In addition, some of these carriers owned fiber optic and/or microwave facilities through which long distance calls were transmitted. (R. 315, 467-468, 664-683, 1220-1232). Whether or not they owned such facilities, all of the carriers (with the possible exception of American Telephone & Telegraph ("AT&T")) regularly purchased or leased transmission capability from one another, and then resold this capacity to their customers. (R. 84-86, 102, 157-158, 1288-1290).

MCI and these other interexchange carriers are relative newcomers to the telecommunications industry. For most of this century, the entire telecommunications industry in the United States—both local and long distance—has been largely dominated by AT&T. *See United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 139 & n.19 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). In the 1970's, however, technological advances resulted in the development of alternatives to AT&T in the long distance market. This early competition was substantially enhanced

---

[2] Citations to "R. ——" refer to the two volume Record of Appellant filed in the Ohio Supreme Court on August 26, 1992.

by AT&T's divestiture of the Bell Operating Companies ("BOCs"). *Id.* at 139.

Following divestiture, the telecommunications industry was sharply divided between local and long distance services. Local telephone service was and continues to be provided throughout most of the United States either by one of the BOCs or by the pre-existing independent local companies on a non-competitive basis.[3] *Id.* at 222-24. Long-distance services were and are provided on a competitive basis by hundreds of interexchange carriers. *See id.*

2. The Ohio Personal Property Tax

Until the 1987 return year, the Ohio tax code defined a "telephone company" to include both local and long distance carriers. Specifically, a "telephone company" was an entity "engaged in the business of transmitting to, from, through, or in [Ohio] telephonic messages." Ohio Rev. Code Ann. § 5727.01(E)(2) (Anderson 1986) (amended 1987). Under Ohio's tax code, a "telephone company" was deemed a "public utility." Ohio Rev. Code Ann. § 5727.01(A) (Anderson 1986). As a "public utility," the property of a "telephone company" was assessed at 100% of true value, rather than at the 31% of true value applicable to a non-utility business. This classification of telephone companies as public utilities reflected the realities of the market as it then existed.

---

[3] These local telephone companies provide local access to interexchange carriers. *United States v. AT&T*, 552 F. Supp. 131, 141 & n.38 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). "Access" involves the origination and termination of a call. A long distance call first must be routed through the local network to the interexchange carrier's switch. The call is then handled by the interexchange carrier, who routes it over its network to the network of the local telephone company serving the point of termination. (R. 89-90). All interexchange carriers must purchase this access in order to provide long distance service. (R. 298).

Initially, with the exception of AT&T, all of the telephone companies engaged in business in Ohio provided local telephone service.[4] Each of these telephone companies enjoyed the traditional characteristics of a public utility, including monopoly status and regulated rates.

As the telecommunications industry began to change and the long distance business became competitive, the Ohio Legislature recognized that the tax structure required change as well. Effective July 1, 1987, the Ohio Legislature amended the statutory definition of "telephone company" to encompass only those entities "primarily engaged in the business of providing local exchange telephone service." Ohio Rev. Code Ann. § 5727.01(E)(2) (Anderson Supp. 1988). This change excluded interexchange (long distance) carriers from the "public utilities" category. *Id.* (amending Anderson 1986). *See also* 142 Laws of Ohio (Pet. II) 2342-44. The Legislature thus sharply divided local service providers, who retained their monopoly status and regulated rates, from long distance service providers, who were operating in a competitive market.

As a result, MCI and the other interexchange carriers were required to pay a number of Ohio taxes from which, due to their public utility classification, they had previously been exempt. These "new" taxes included, for example, the Ohio sales and use tax and the Ohio corporate franchise tax. Ohio Rev. Code Ann. §§ 5739.01 (B)(3)(f), 5739.01(AA), 5739.02(B)(7) (Anderson Supp. 1988). Coherent and consistent treatment would have resulted in assessing the property of interexchange carriers at 31% of value for purposes of the personal property tax. Apparently, however, the Legislature did not wish to forego the higher revenues that resulted from assessing the property of interexchange carriers at the

---

[4] AT&T had a virtual monopoly on long distance service either through its Long Lines Division or its ownership of Ohio Bell Telephone Company.

level reserved for public utilities. (R. 582). The Legislature enacted an additional provision, requiring the Commissioner to assess the property of interexchange carriers at 100% of true value, the listing percentage for public utilities, despite the fact that the Legislature had just acknowledged that interexchange carriers were not public utilities. Specifically, the Legislature provided that:

> [i]n the case of a person that would have been a telephone company . . . prior to the effective date of the amendment . . . and that is not a telephone company . . . after the effective date of [the] amendment, all tangible personal property . . . of [such] persons . . . shall be valued and assesed by the tax commisioner in the same manner as taxable property of all public utilities except railroads.

Ohio Rev. Code Ann. § 5727.06(C) (Anderson Supp. 1988).

3. The Discriminatory Treatment

This case deals with discrimination *within* a class of taxpayers. There were more than 60 companies purchasing access—and thus providing long distance service—in Ohio in 1987. (R. 655-660). The discrimination at issue here arose because the Commissioner did not treat all of these long distance carriers equally in implementing the statute. In calculating MCI's property tax obligation for 1987, the Commissioner determined a true value of $105 million for taxable tangible personal property and applied the 100% listing percentage (assessment ratio). For 1987, MCI paid $6.8 million in Ohio alone, approximately three times the amount it would have had to pay if its property had been assessed at the 31% rate. (R. 120-121, 601-604, 605-608).

Unlike MCI, the personal property tax of many other interexchange carriers was assessed at the lower percentage of value. As the Commissioner has stipulated,

companies that he deemed "resellers," *i.e.*, those that are "primarily engaged in the business of acquiring long distance telephone service" from a facilities-based carrier and "reselling that long distance telephone service to [their] customers," were assessed at only 31% of value. Pet. App. A55. In contrast, the Commissioner claimed that long distance carriers that he deemed "facilities-based" (like MCI) were assessed at the 100% rate. *Id.* The consequence was that the same switching equipment was taxed at different rates.

The distinction asserted by the Commissioner was not in fact applied. As the record demonstrates, there were facilities-based carriers that also were assessed at only 31% of value. (*E.g.*, R. 231, 233-234, 271-276, 315, 661-772, 1027-1055). MCI was precluded from documenting each such instance of discriminatory treatment due to the Commissioner's resistance to turning over relevant documents he classified as confidential. However, at the administrative hearing, MCI was able to obtain and thereafter introduced into evidence detailed records of two of the interexchange carriers assessed at the lower rate.[5] These records from the Commissioner's own files demonstrated that both companies owned significant transmission equipment in the State, as did MCI, and that both companies constituted "facilities-based carriers" under the Commissioner's own definition, as did MCI. (R. 231, 233-234, 271-276, 315, 661, 1027). Faced with those documents, the Commissioner conceded at the hearing that "both of the companies should have been filing as a public utility as MCI has been," and that their property should have been assessed at the 100% rate. (R. 278).

---

[5] These carriers were Allnet Communications Services, Inc. ("Allnet") and Cable & Wireless Management Services, Inc. ("Cable & Wireless").

4. The Proceedings Below

Based on the substantially lower listing percentage applied to its direct competitors, MCI requested that the Commissioner conduct a review and redetermination of MCI's 1987 property tax liability. Following a hearing, the Commissioner denied MCI's objections.

Thereafter, MCI appealed the Commissioner's determination to the Ohio Board of Tax Appeals ("BTA"), asserting that assessing MCI's taxable property at 100% of true value while assessing the personal property of other interexchange carriers at 31% of value, denied MCI equal protection of the law in violation of both the United States and Ohio Constitutions.[6] The BTA received all the evidence but, due to its limited jurisdiction, did not resolve the constitutional claims. Pet. App. A5. MCI appealed to the Ohio Supreme Court, again raising its claims that the tax statutes as applied to MCI violated the equal protection clauses of the United States and Ohio Constitutions.[7]

On appeal, the Ohio Supreme Court held that "two taxpayers within the same class owning or leasing the same type of equipment are treated differently, and this treatment denies MCI equal protection of the laws." Pet. App. A11. To the Court, "[t]he only distinction between MCI and resellers is that MCI, a facility-based carrier, owns or leases the transmission equipment while resellers lease [long distance] lines from other interexchange carriers," *id.* at A10, a distinction that lacked significance. In this connection, the Ohio Supreme Court noted that the body assigned regulatory authority over interexchange carriers had rejected the notion that

---

[6] MCI raised state law claims as well as other state and federal constitutional claims.

[7] The Commissioner cross-appealed from the BTA's finding (on MCI's state law claim) that the taxable value of MCI's property was improperly apportioned. Pet. App. A26.

facilities-based carriers and resellers are distinct under the Ohio code. *Id.* at A11.

The Ohio Supreme Court relied on a decision of the Wisconsin Supreme Court, which reached the identical conclusion. *Id.* In *GTE Sprint Communications v. Wisconsin Bell*, 454 N.W. 2d 797 (Wis. 1990), the Wisconsin Supreme Court held that differential tax treatment of resellers and facilities-based carriers violates equal protection. The Wisconsin court explicitly rejected the argument that ownership of facilities is an adequate basis for differentiating between the resellers and these other carriers. *Id.* at 802. In addition, the Ohio Supreme Court relied on its own decision in *Boothe Financial Corp. v. Lindley*, 452 N.E.2d 1295 (1983), *cert. denied*, 464 U.S. 1057 (1984), in which it had held that taxing lessors of equipment differently from those who both manufactured and leased the same equipment constituted a denial of equal protection. Pet. App. A9-A10. Accordingly, the Ohio Supreme Court held that there was no basis for treating MCI differently and that assessing its property at 100% of value while assessing that of its direct competitors at only 31% of value constituted a denial of equal protection under the United States and the Ohio Constitutions. The petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

Petitioner has shown no basis for granting certiorari in this case. This Court has expressly held that, notwithstanding the wide latitude accorded states in determining what and how to tax (*see Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930)), the equal protection clause "protects persons from unconstitutional discrimination by the states." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985) (footnote omitted). The conclusion reflected in the decision below—that taxing the property of one interexchange carrier at 100% of value while taxing the property of that carrier's direct competitors at only 31% of value violates the equal protection clause—is fully consistent with and faithfully implements this Court's decisions. It is likewise consistent with the only other state supreme court to consider the question. At issue here is simply an application of established principles to the facts of this case, and review is not warranted.

I. THE OHIO SUPREME COURT CORRECTLY CONCLUDED THAT DISCRIMINATION WITHIN THE CLASS OF LONG DISTANCE CARRIERS IS UNCONSTITUTIONAL

It is by now well established that a taxpayer, although assessed at not more than true value, may be unlawfully discriminated against by undervaluation of property of other taxpayers in the same class. *Southern Rwy. v. Watts*, 260 U.S. 519, 526 (1923). As the record in this case makes clear, that is precisely what happened here. Indeed, the Commissioner conceded that MCI's property was assessed for property tax purposes at 100% of value while the property of other interexchange carriers, who are direct competitors of MCI, was assessed at only 31% of value. (R. 1288-1289).[8] The conclusion that this vio-

[8] The Commissioner's claim that "the alleged discrimination was totally theoretical" and "never proved" (Pet. Cert. 16) is unten-

lates equal protection is fully consistent with the decisions of this Court.

1. The Commissioner asserts that the discrimination can be explained because some of the interexchange carriers who were treated differently were "resellers of telephone services," and thus were unlike MCI, which the Commissioner considers to be a "facilities-based carrier." Pet. 12, 14. "Resellers," according to the Commissioner, lease transmission capability from other interexchange carriers and, using their own switching equipment, provide long distance services to their customers. (R. 84, 157-158, 1290). Facilities-based carriers, in contrast, which were assessed at the 100% rate, were those "operating, either through ownership or lease, an integrated system of switching devices . . . and associated equipment in a manner that would allow a telephone message to be sent . . . ." Pet. App. A54-A55.

The distinction urged by the Commissioner is directly contrary to the factual record in this case. According to the uncontroverted testimony at the hearing, "[t]here was no sharp distinction between resellers and other interexchange carriers . . . . Most interexchange carriers provide some combination of resale and their own facilities." (R. 86, 102). MCI "began as a reseller," as the Ohio Supreme Court recognized (Pet. App. A-3), and continued to operate as both a reseller and a facilities-based carrier. MCI directly competed with those interexchange carriers who, based on their "reseller status," were taxed at the lower rate. (R. 88, 158-159, 650). Both MCI and the other resellers provided long distance telephone service to customers. (R. 158-159). Both were subject

---

able. It was implicitly rejected by the Ohio Supreme Court. Pet. App. A8. Equally significant, the Commissioner stipulated to the precise fact that he now claims was "never proved," *i.e.*, that "resellers" were treated differently than "facilities-based" carriers. Pet. App. A54-A55. The purpose of entering the stipulation was to eliminate the need for the Commissioner to produce taxpayer records, which he had resisted on confidentiality grounds.

to identical Ohio regulatory schemes. (R. 156-158, 310). Both were treated identically by Ohio for other tax and non-tax purposes. *Id.* The uncontroverted record demonstrates that all of these interexchange carriers, whether deemed "resellers" or otherwise, owned equipment essential to long distance transmission, including the "switching devices" specifically referenced in the Commissioner's own definition of a facilities-based carrier. (R. 305, 308).[9] As a result of the Commissioner's discriminatory scheme, the same equipment which was put to the same purpose was taxed at significantly different rates.

2. The Commissioner nonetheless suggests that the distinction between facilities-based carriers and resellers is permissible because it rests, he claims, on other rational bases. Pet. 14-18. Thus, the Commissioner argues, without citation to any authority or to the record, that facilities-based carriers "are squarely in a position to pass their costs on to their customers," while so-called "resellers" cannot. Pet. 15. This suggestion is contrary to the record. The record demonstrates that MCI's rates are actually set in the marketplace, which limits MCI's ability to pass along costs that are not borne in equal measure by its direct competitors. (R. 83, 88, 109-110, 156-157).[10]

Equally incorrect is the Commissioner's suggestion that distinguishing between facilities-based carriers and so-called "resellers" is permissible because it might "create

---

[9] This Court has recently ruled that all of these carriers, whether functioning as resellers or otherwise, are required to file tariffs with the Federal Communications Commission ("FCC"). *United States v. MCI*, 114 S.Ct. 2223 (1994).

[10] Significantly, this Court has expressly cautioned against this sort of speculative conclusion that certain costs have been "passed on" to purchasers: "We repeatedly have recognized that determining whether a particular business cost has in fact been passed on to customers or suppliers entails a highly sophisticated theoretical and factual inquiry. . . ." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 47 (1990).

increased competition among resellers" leading to price benefits for consumers. Pet. 15. Even if encouraging competition were the purpose of the discriminatory tax scheme—and there is no indication that it is—the distinction still lacks a rational basis. Burdening a competitor hardly appears designed to promote competition, nor would it promote constitutionally-protected interests. Indeed, in the commercial context, requiring states to treat similarly-situated entities in like manner is intended to create a level playing field, so that competitors may fairly compete. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. at 878.

Finally, the Commissioner suggests that the distinction must be viewed as permissible in order to avoid the disruption that could result from refunding the unlawfully collected tax. Pet. 9, 18. But the possibility of disruption does not absolve a state from remedying its unconstitutional taxation. As this Court plainly recognized in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 50 (1990), "the State's interest in financial stability does not justify a refusal to provide relief."

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISIONS OF OTHER STATE SUPREME COURTS

There are no cases of which we are aware, and the Commissioner has cited none, in which a court upheld disparate taxation of two entities primarily engaged in the same business which performed the same function through use of the same equipment. The cases cited by the Commissioner all involve entities engaged in two separate forms of commerce.[11] Thus, in *Pacific Express Co.*

---

[11] The Commissioner's suggestion (Pet. 23) that the decision in *Nordlinger v. Hahn*, 112 S.Ct. 2326, 2329 (1992), invalidated the Ohio Supreme Court's earlier decision in *Boothe Financial Corp. v. Lindley*, 452 N.E.2d 1295 (1983), *cert. denied*, 464 U.S. 1057 (1984), is without foundation. At issue in *Boothe* was not an acquisition-based system of establishing real property values, but

v. Siebert, 142 U.S. 339, 353 (1992) (cited at Pet. 14), this Court held that equal protection is not violated where a tax imposed on one sort of business—express companies—is not imposed on a wholly different business—railroads. Likewise, in *Citizens' Telephone Co. v. Fuller*, 229 U.S. 322, 327 (1913) (cited at Pet. 14), upon which the Commissioner also relies, this Court held it proper for a state to distinguish for tax purposes between a for-profit business and an association that is not engaged in a for-profit venture, a holding that is neither novel nor relevant to this case. The Commissioner's reliance on *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89 (1900), (Pet. 15), is equally misplaced. There, a tax imposed on sugar refiners that did not extend to sugar growers, a separate line of business, was held constitutionally-permissible. The disparate taxation in *American Sugar* not only served a legitimate purpose—encouraging agriculture—it was constitutionally-permissible because the disparate tax was imposed on disparate businesses.[12]

---

rather, like the present case, disparate taxation of two entities engaged in the same business.

[12] The cases from state courts of appeals and supreme courts cited by the Commissioner are equally inapplicable. Thus, in *Bosworth v. Pledger*, 810 S.W.2d 918, 923 (Ark.), *cert. denied*, 112 S.Ct. 617 (1991) (cited at Pet. 19, 20), the Arkansas Supreme Court held that the equal protection clause does not preclude a state from taxing private residential customers of telephone service different from business users of telephone service for sales tax purposes. In *State ex rel. Utilities Commission v. Southern Bell Tel. & Tel. Co.*, 363 S.E.2d 73, 83 (N.C. Ct. App. 1987) (cited at Pet. 20), the North Carolina court of appeals held that equal protection does not preclude requiring providers of long distance service to compensate providers of local service for unauthorized local use. The court there did not limit that requirement just to facilities-based carriers or to so-called resellers; to the contrary, it imposed the obligation without regard to any such distinction. In *Chesterfield Cablevision v. County of Chesterfield*, 401 S.E.2d 678, 680 (Va. 1991) (cited at Pet. 20), the Virginia Supreme Court upheld, over a challenge on First Amendment and equal protection grounds, a business license tax applicable to a cable television operator that did not apply to

Significantly, the only state court of last resort to consider the narrow issue here reached exactly the same conclusion as the Supreme Court of Ohio: that differential tax treatment of so-called resellers and facilities-based carriers violates equal protection. In *GTE Sprint v. Wisconsin Bell*, 454 N.W.2d 797 (Wis. 1990), the Wisconsin Court expressly rejected the argument that ownership of facilities was an adequate basis for differentiating between resellers and other carriers for purposes of a sales tax. "The fact that [facilities-based] carriers 'own' the facilities which provide the intermediate link in their telecommunications services while resellers do not does not justify the disparate tax treatment here." *Id.* at 802. As that court recognized, *id.*, the equal protection clause requires that the same tax apply to these similarly-situated entities.

III. IN ANY EVENT, THE DECISION BELOW IS CLEARLY CORRECT BECAUSE THE STATE DID NOT IN FACT APPLY THE DISTINCTION UPON WHICH IT NOW RELIES

Even if the State could justify differential treatment of resellers and facilities-based carriers, that was not the distinction applied by the Commissioner. The property of other facilities-based carriers was assessed at the 31% rate applicable to resellers. As a result, MCI was re-

---

radio or television broadcasters. And in *Boston Real Estate Bd. v. Department of Public Utilities*, 136 N.E.2d 243 (Mass. 1956) (cited at Pet. 21), the Massachusetts Supreme Judicial Court held that the equal protection clause, *inter alia*, did not preclude the Department of Public Utilities from establishing a monopoly in the provision of electrical services. *C. Thomas Stores Sales System v. Spaeth*, 297 N.W. 9 (Minn. 1941) (cited at Pet. 21), likewise provides no support for the Commissioner. That case, consistent with a long line of cases from this Court (*see, e.g., Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937)), held that states may tax chain stores and not tax manufacturers selling their own products. As the Minnesota court there recognized, "chain stores are a distinct business species" from independent merchants. 297 N.W. at 16.

quired to pay taxes based on a 100% assessment, while the property of companies that the Commissioner himself considered identical to MCI was assessed at the lower rate.

Although wholly unaddressed by the Commissioner in his petition, the record clearly demonstrated that other interexchange carriers—those that the Commissioner himself deemed to be "facilities-based"—were assessed at only 31% of true value, while MCI was assessed at 100% of true value. There were more than sixty companies purchasing access—and thus providing long distance service—in Ohio during the relevant period. (R. 655-660). The Commissioner's refusal to produce documents precluded MCI from establishing precisely how many of those companies would fall into the Commissioner's definition of "facilities-based carriers." At the hearing, five companies that appeared on the list of those purchasing access were specifically identified as "facilities-based." The records of two such carriers, *see* n.5 *supra,* demonstrated that both "facilities-based carriers" stood in precisely the same position as MCI. (R. 233-234, 271-275, 315, 661-772, 1027-1055). Nonetheless, neither was assessed at 100% of value. (R. 231-234, 274-276). The Commissioner conceded at the BTA hearing that under the terms of the Ohio Revised Code, "both of the companies should have been filing . . . as MCI has been" and assessed at the 100% rate. (R. 278).

Thus, the distinction upon which the Commissioner now relies—between facilities-based carriers and so-called resellers—was not applied in practice. This discrimination arose in the context of an administrative structure that, as designed, was incapable of discerning compliance at the most basic level—whether a taxpayer was filing under the correct category. (R. 276-279, 288-290, 994-1026). *See Snowden v. Hughes*, 321 U.S. 1, 9 (1944). Under these circumstances, Ohio cannot possibly justify its discriminatory treatment.

As we have discussed, the decision below clearly is correct. It does not conflict with decisions of this Court or the supreme courts of other states. These issues arise only infrequently. Under these circumstances, review by this Court is unwarranted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:
WALTER NAGEL
DOUGLAS A. RICHARDS
MCI TELECOMMUNICATIONS CORPORATION
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6216

TIMOTHY B. DYK
(Counsel of Record)
BETH HEIFETZ
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

JOHN C. DUFFY, JR.
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939
Counsel for Respondent

Dated: August 8, 1994

Supreme Court, U.S.
FILED
JUL 7 1994
OFFICE OF THE CLERK

No. 93-1974

In The

Supreme Court of the United States

October Term, 1994

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,

Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF OF *AMICI CURIAE* CITY OF NORTH ROYALTON AND NORTH ROYALTON CITY SCHOOL DISTRICT BOARD OF EDUCATION IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

MARK A. ENGEL
[redacted]
SYLVIA LYNN GILLIS
BRICKER & ECKLER
100 South Third Street
Columbus, Ohio
43215-4291
(614) 227-2327

DENNIS RADEMAKER
PETRO, RADEMAKER, MATTY
& MCCLELLAND
55 Public Square,
Suite 1775
Cleveland, Ohio 44113
(216) 621-6570

DENNIS RADEMAKER
LAW DIRECTOR
City of North Royalton
55 Public Square,
Suite 2240
Cleveland, Ohio 44113
(216) 861-3610

Attorneys for Amici Curiae City of North Royalton and North Royalton City School District Board of Education

RECEIVED
JUL - 8 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A STATE VIOLATES THE EQUAL PROTECTION CLAUSE WHEN IT DRAWS A RATIONAL CLASSIFICATION AMONG TAXPAYERS FOR TAX AND REVENUE PURPOSES THAT DIFFERS FROM THE DISTINCT CLASSIFICATIONS THE STATE HAS DRAWN ABOUT THOSE SAME PERSONS FOR REGULATORY OR OTHER PURPOSES UNDER THE STATE'S POLICE POWERS.

II. WHETHER A COURT CAN PROPERLY FIND A VIOLATION OF THE EQUAL PROTECTION CLAUSE BY IGNORING PLAUSIBLE POLICY REASONS THAT SUPPORT A STATE'S RATIONAL TAX CLASSIFICATION, RELYING SOLELY ON THEORETICAL DISCRIMINATION THAT IS NOT SHOWN TO HAVE ACTUALLY OCCURRED, AND ABSENT ANY INVIDIOUS DISCRIMINATION OR BAD FAITH ACTIONS BY STATE OFFICIALS.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

INTEREST OF *AMICI CURIAE* 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. STATES HAVE BROAD DISCRETION IN DEVISING A REASONABLE STATE TAX SYSTEM. A TAXPAYER CHALLENGING A TAX CLASSIFICATION ON EQUAL PROTECTION GROUNDS MUST NOT ONLY NEGATE EVERY CONCEIVABLE BASIS UPHOLDING THE CLASSIFICATION, BUT MUST ALSO PROVE THE EXISTENCE OF ACTUAL DISCRIMINATION, BEFORE THE SYSTEM WILL BE STRUCK DOWN AS VIOLATIVE OF FEDERAL EQUAL PROTECTION 5

A. The Ohio Court Failed to Determine Whether Any Rational Basis Existed for the Distinction Between Facility-Based Carriers and Resellers 6

B. The Court Below Failed to Find That Any Discrimination Occurred in Fact 8

C. The Impact of the Decision of the Court Below Will Adversely Affect in a Profound Manner both *Amici Curiae* City of North Royalton and North Royalton City School District Board of Education 9

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 5, 6

Bell's Gap Railway Co. v. Pennsylvania, 134 U.S. 232 (1890) 5

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) 6, 7

Madden v. Kentucky, 309 U.S. 83 (1940) 6, 8

Nordlinger v. Hahn, 505 U.S. ___, 112 S. Ct. 2326 (1992) 6

Roberts & Shaffer Co. v. Emmerson, 271 U.S. 50 (1926) 9

STATUTES

Ohio Rev. Code Section 5727.01(A) 10

Ohio Rev. Code Section 5727.01(E)(2) 10

STATEMENT OF THE CASE

This matter arises out of an administrative appeal by Respondent with respect to its 1987 Ohio public utility property tax return. Upon the assessment and apportionment of the value of its property by Petitioner, Respondent claimed that its property should be taxed as a general property taxpayer (at 31% of its true value) rather than as a telephone company (at 100% of its true value). Respondent further claimed that its property should be apportioned differently than in previous years. Petitioner denied the claims and Respondent appealed to the Ohio Board of Tax Appeals ("BTA").

Before the BTA, Respondent pressed its two original claims. For the first time, it also raised a constitutional argument. Respondent claimed that since resellers were regulated in the same manner as facility-based carriers, they must be taxed as facility-based carriers. However, the policy of Petitioner is to assess the property of resellers as general property taxpayers. Respondent claimed that this disparity in treatment denied to it equal protection of the laws. It presented no evidence indicating that the statutory scheme upon which the policy was based was not founded upon some rational basis, nor did it demonstrate in fact that any reseller, if any existed, was treated differently for the 1987 tax year. The BTA agreed with Respondent with respect to the apportionment issue and, as an administrative agency without authority to do so, declined to rule on the constitutional issue.

Both parties appealed to the Ohio Supreme Court. Even though plausible reasons were suggested, that court failed to consider whether any rational basis existed to

support the different treatment of resellers and facility-based carriers for tax purposes or to consider whether any discrimination had in fact occurred. Instead, it reasoned that since facility-based carriers and resellers were subject to the same type of rate and reporting regulation by the Ohio Public Utilities Commission, they were members of the same class for tax purposes. Following the denial of a motion for rehearing, Petitioner filed its petition with this Court.

Amici first became involved in the litigation before the BTA, where they attended the hearing but did not participate. Administrative proceedings before Petitioner are confidential, and there is no formal mechanism for making affected taxing districts a party when a property tax matter is appealed to the BTA. *Amici* filed an amicus brief when the decision of the BTA was appealed to the Ohio Supreme Court.

INTEREST OF *AMICI CURIAE*

Amici curiae City of North Royalton, Ohio and North Royalton City School District Board of Education have a substantial interest in the outcome of this litigation. The majority of Respondent's taxable personal property, the microwave equipment which is the subject of Respondent's claim that the value of its property has been improperly and unfairly assessed and apportioned by the State of Ohio, is located within the City of North Royalton and the North Royalton City School District. Both the City of North Royalton and the North Royalton City

School District Board of Education are recipients of the tax revenues generated by the *ad valorem* taxes imposed upon the property of Respondent and are dependent upon these revenues in the planning of municipal and educational public programs. *Amici curiae* are representative of other governmental entities, including other school districts, throughout the State of Ohio whose operations will be significantly and adversely impaired if the Ohio Supreme Court's finding that the manner used by the Tax Commissioner in assessing the value of Respondent's personal property violated the Equal Protection Clause.

The Ohio Supreme Court made no finding that the classification used by the Tax Commissioner in assessing the value of Respondent's personal property lacked a rational basis; the Ohio court also failed to find in fact that Respondent suffered any invidious discrimination in the assessment of its property. In fact, the court never even considered these issues. Nevertheless, it ordered that Respondent's assessment percentage be reduced from that applied to telephone companies to that used for general business property. In reaching this decision, the Ohio court failed to consider the arguments advanced by Petitioner in support of its assessment procedure. More importantly, it failed to apply the tests enunciated by this Court as applicable in equal protection cases. The result of the implementation of the Ohio court's decision will be devastating for *amici curiae* and other similarly situated local governmental entities and school districts.

SUMMARY OF THE ARGUMENT

Amici curiae respectfully submit that Petitioner's application of the Ohio statutes to Respondent's taxable property for purposes of assessing personal property taxes owing to the State is proper and that the method employed by Petitioner has a rational basis that does not violate the Equal Protection Clause of either the Federal or State Constitution. It is entirely reasonable to distinguish between facility-based carriers, such as Respondent, who own their own integrated systems of transmission equipment through which they conduct their business of transmitting telephonic messages, and buyers and resellers of such services, who do not own their own equipment, but rather contract with others who own the equipment to provide the service.

In addition, there are other plausible reasons for the assessment of Respondent's property at the higher rate applicable to telephone companies. Also, application of the Ohio court's decision, even if determined to be the proper interpretation of federal constitutional law, would have a devastating effect upon local taxing districts in which the personal property of Respondent and other facility-based carriers is located. Thus, the erroneous analysis employed by the Ohio court will have a crippling effect upon local governments and the public education system within the State and will provide to Respondent and other telephone companies an unanticipated tax windfall.

ARGUMENT

I. STATES HAVE BROAD DISCRETION IN DEVISING A REASONABLE STATE TAX SYSTEM. A TAXPAYER CHALLENGING A TAX CLASSIFICATION ON EQUAL PROTECTION GROUNDS MUST NOT ONLY NEGATE EVERY CONCEIVABLE BASIS UPHOLDING THE CLASSIFICATION, BUT MUST ALSO PROVE THE EXISTENCE OF ACTUAL DISCRIMINATION, BEFORE THE SYSTEM WILL BE STRUCK DOWN AS VIOLATIVE OF FEDERAL EQUAL PROTECTION.

The Ohio Supreme Court found that Petitioner's policy of taxing the property of facility-based carriers at a rate higher than resellers and general property taxpayers denied to Respondent the equal protection of the laws. In making that determination, the Ohio court failed to consider whether any conceivable basis existed for the classification. The court also failed to consider in fact whether any discrimination actually occurred. For these reasons, the Ohio court's holding is at odds with the equal protection principles long espoused by this Court. The Ohio court's decision must, therefore, be reviewed and reversed.

This Court has long recognized that states are granted "very wide discretion" in selecting the subjects of taxation and the classifications inherent in the laying of state taxes. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959). There is no iron rule of equality in the field of tax classifications. *Bell's Gap Railway Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890). Even the narrowest of

distinctions may be upheld, so long as there is any possible basis for the distinction between classes. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937).

Moreover, the state has no obligation to state expressly the purpose for which a distinction is made. If there is any conceivable basis for the distinction, it will be upheld. *Nordlinger v. Hahn*, 505 U.S. ___, 112 S. Ct. 2326 (1992). Therefore, the burden is on the party challenging the classification to refute every conceivable basis for the distinction. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). It must demonstrate discrimination in fact.

A. The Ohio Court Failed to Determine Whether Any Rational Basis Existed for the Distinction Between Facility-based Carriers and Resellers.

A state may resort to fine distinctions for tax classification purposes. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959). A classification will be upheld as long as it is not arbitrary and is founded upon a legitimate policy. A state is not required to tax all members of a class or to tax none of the members of the class. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. at 509. In *Carmichael*, this Court stated that administrative convenience and expense in the collection or measurement of a tax are permissible bases for distinguishing between members of a class. This Court also observed that distinctions may be made to encourage certain economic activities or to discourage others.

In this case, the Ohio court fell short on two accounts. First, it never considered the possible bases for the distinction drawn between facility-based carriers and

resellers. Most obviously, there is a distinct difference between the two entities in terms of the property owned and the activities performed. The record demonstrates that facility-based carriers own an integrated system for the transmitting of telephonic messages, including transmission equipment. Resellers do not; they merely purchase and resell telephone services from facility-based carriers. This difference in fact between the two entities was never considered by the court below.

Moreover, other possible reasons supporting the distinction were offered by Petitioner. Petitioner stated that subjecting resellers to a lower rate of taxation could serve to encourage resellers in order to increase competition and to reduce the costs of long distance telephone service to consumers. As noted in *Carmichael v. Southern Coal & Coke Co., supra,* distinctions designed to encourage some business entities or activities over another are permitted. Another possible basis posited by Petitioner was that facility-based carriers can pass on the higher cost of the tax to a broader range of customers more easily than can resellers.

There is yet another possible basis for the distinction. Distinctions may be based upon administrative convenience and the cost of collecting the tax. For example, in *Carmichael v. Southern Coal & Coke Co.*, this Court upheld a challenge to the classification between employers of eight (8) or more persons and employers of seven (7) or less persons. One of the reasons given for sustaining the classification was the administrative inconvenience of taxing smaller entities that did not yield great amounts of revenue.

The same situation exists here. Facility-based carriers own the largest portion of the property taxed to telephone companies in Ohio. Their transmission systems are massive. Resellers, to the extent they operate in Ohio at all, have very little personal property. The state legislature could have taken this difference into consideration in drafting the legislation in question. The court below made no finding on this point because it failed to consider the issue.

Although these issues were raised, Respondent did not address any of these issues, and the Ohio court did not consider them. Yet, it is a fundamental tenet of equal protection analysis that the party challenging the classification must disprove every conceivable basis for the classification. In failing even to make this analysis, the decision below is contrary to the express and consistent dictates of this Court in the area of equal protection jurisprudence.

B. The Court Below Failed to Find That Any Discrimination Occurred in Fact.

The Ohio court also fell short in assuming that Petitioner's policy of treating resellers differently from facility-based carriers demonstrated actual discrimination to the detriment of Respondent. A denial of equal protection will not be presumed. There must be the most explicit demonstration that a classification results in hostile and oppressive discrimination before it will be struck down. *Madden v. Kentucky, supra.* A challenge may not rest solely

upon theoretical inequalities. *Roberts & Shaffer Co. v. Emmerson*, 271 U.S. 50, 54-55 (1926).

In this case, Petitioner has admitted a policy of differentiation between facility-based carriers and resellers in the area of property taxation. Assuming for the moment that this distinction may be without any rational basis, the Court below still erred in its decision. If there is in fact no discrimination, there is no denial of equal protection. The record in this case is devoid of any evidence that any reseller existed in Ohio in 1987 or had its property taxed in a manner different from Respondent's property. The Ohio court failed to make any inquiry into this subject; it merely assumed that discrimination occurred. This determination is clearly contrary to the settled decisions of this Court on the subject.

This error is significant.

C. The Impact of the Decision of the Court Below Will Adversely Affect in a Profound Manner both *Amici Curiae* City of North Royalton and North Royalton City School District Board of Education.

Public utility personal property taxes, including those of telephone companies, assessed by the Tax Commissioner are apportioned among the individual taxing districts throughout the State of Ohio based upon the value of the public utility's property located in each taxing district. The Tax Commissioner has reasonably found Respondent to be a telephone company, and therefore a public utility, for purposes of assessing personal property taxes owing to the State of Ohio based upon a

plain reading of Ohio Rev. Code Sections 5727.01(A) and 5727.01(E)(2).

Respondent has even categorized itself as a public utility when seeking benefits from the City of North Royalton for the location of its microwave facilities. Respondent repeatedly represented to the City of North Royalton, as early as 1972 when its initial microwave tower was erected and as recently as 1988 when it sought to expand its facility, that it was a public utility. Based on the City of North Royalton's finding that Respondent was in fact a public utility, the City authorized the construction and expansion of Respondent's telephone facilities in a residential area where, but for Respondent's status as a public utility, the facilities would not otherwise have been permitted. It is patently unfair now to allow Respondent to be taxed as other than a public utility when it has benefited greatly from the favorable treatment afforded it by the City of North Royalton on the basis that it was in fact a public utility.

The apportionment method for taxable property of public utilities in Ohio was statutorily established after careful consideration and proper operation of the legislative process. Respondent's personal property subject to taxation by the State of Ohio was and continues to be located in taxing districts throughout the State of Ohio. A change in the assessment process of the drastic nature mandated by the lower court would result in inequities to the local taxing districts that cannot be tolerated.

Local taxing districts rely upon the taxes assessed by the Tax Commissioner upon property located within their borders to fund local government programs, including

public education. The Tax Commissioner has consistently, correctly, and logically interpreted the Ohio statutes defining telephone companies to include facility-based carriers, such as Respondent, for many years. As a result of this interpretation and application of Ohio law to facility-based carriers, local taxing districts include the potential taxes assessed against public utility personal property in their budget planning process. For example, each of the *amici* has committed financial resources to significant activities within its respective district based upon the continued receipt of tax revenues from Respondent's personal property located within the district. The City of North Royalton in October 1990 undertook a bond obligation of $2.6 million for the construction of a police and jail facility; the annual debt service on that bond issue is approximately $250,000.00. The City of North Royalton also authorized $490,000.00 in bonds for the acquisition of real property in July of 1991; the annual debt service on this bond issue is approximately $46,000.00. Neither of these obligations would have been undertaken if the City had any indication that the tax revenues it was currently receiving from the property of Respondent located within the district would cease.

The City's ability to continue to fund these projects, plus repay to Respondent with interest the amounts advanced to date under the assessment procedure found to be unconstitutional by the lower court, is not possible. Application of the decision of the court below will require the City of North Royalton, the North Royalton City School District Board of Education, and all other similarly situated taxing districts, to repay revenue that was spent five years ago and to which they had no reason

to believe they were not entitled. Specifically, the North Royalton City School District Board of Education will be required to refund the approximate amount of $1,250,000.00 per year for a period of five years, plus interest, while the City of North Royalton will be required to refund the approximate amount of $450,000.00 per year for each of the five years in question.

Respondent and other facility-based carriers have similar claims pending for subsequent years. Cities and school districts across the state will be faced with the double whammy of reductions in tax revenues and the making of huge refunds from those decreased resources. The result will be crippling to local government and public education in Ohio.

School districts in Ohio today are facing severe financial crises in meeting the many unfunded mandates with which they are expected to comply and in meeting the ever-increasing costs of existing programs. Any expectation that these school districts would be able to repay funds already spent ignores the realities of the current plight of many Ohio school districts. School districts in large part are barely, and in some instances not even, able to meet the basic educational needs of their students. Buildings and equipment are in poor repair; books are outdated and scarce; supplies are practically non-existent. In this environment, the requirement that these districts repay tax revenues received by them to which they believed they were entitled, which they have already invested in the educational process, and which Respondent has always paid in the past, is patently unfair and should not be allowed to stand.

For example, the value of Respondent's property situated within the North Royalton City School District was certified by the Commission at $15,201,610.00 for tax year 1987. The tax certified for this property for the tax year 1987 was $1,258,693. This figure will be reduced by two-thirds as a result of the erroneous decision of the Ohio court below.

This is by far the largest amount of tax revenue directed to a single district within Ohio for this period of time. Exhibit M to the proceedings below summarizes by individual taxing district in Ohio the value of the assessed personal property tax upon Respondent's taxable property for the year 1987. Taxes as certified range from less than one thousand dollars to over one million dollars. Regardless of the amount to be repaid, any taxing district will undoubtedly have difficulty in repaying amounts advanced over the past five years, plus interest on those amounts, as directed by the court below.

Any considerations given by the Ohio legislature to changing the structure of personal property taxation treatment of different businesses, such as Respondent's, have met with opposition from legislators because of the concern for local revenue and the funding of public education. Approximately seventy percent of all property tax revenue is provided to the school districts. These local tax revenues provide approximately 50% of the revenues available for public education in Ohio. Because of the concern that any change in personal property taxation methods could negatively impact the amounts of personal property tax available to local school districts, any proposed changes in the personal property taxation methodology have been subjected to great scrutiny. The

deposition of the then-Tax Commissioner in the proceedings below demonstrates that one of the basic tenets of the Department of Taxation when reviewing or considering any proposed change in personal property taxation was that there be no loss of revenue to school districts. Although legislation has been introduced at various times that would change the tax scheme to which long distance carriers are subject, such changes have never been enacted because of the concern that there be no revenue reduction to school districts and local governments.

The hardship that will be experienced by the local taxing districts, and in particular school districts, will not be similarly inflicted upon Respondent if the decision below is reversed. Respondent and all other telephone companies have been subjected to the higher personal property tax rate for several years. If the decision below is reversed, Respondent will not be subjected to a higher rate of taxation than in previous years; rather, it will continue to be taxed as it has in years past. Moreover, as a regulated entity, Respondent was able to, and will continue to be able to, set its rates and conduct its affairs to minimize the impact of the existing personal property taxes.

Application of the Ohio court's decision will have a crippling effect upon both the City of North Royalton and North Royalton City School District Board of Education. The revenues apportioned to each of these taxing districts have already been spent in reasonable reliance upon the belief that each was entitled to the revenues received from the State as a result of the presence of Respondent's equipment in the district. In addition, both tax districts have made significant financial commitments based upon

the reasonable assumption that the revenue would continue at the same level. The fiscal straits confronting local governments and school districts should not be exacerbated by the application of the ill-considered decision of the court below.

CONCLUSION

The Tax Commissioner has rightly and fairly found Respondent to be a telephone company for purposes of personal property tax assessment and apportionment throughout the local taxing districts in the State in which its taxable property is located. These recipients of revenue have relied upon these funds in the development of their budgets and planning to meet public needs in the community. To change retroactively the manner in which these taxes are assessed would be grossly unfair to the local taxing districts which have been the recipient of these funds. To require that these local taxing districts repay any revenues received by them over the past five years, plus interest, ia patently unfair and may lead to financial insolvency at the local level for many districts similarly situated to *amici*.

The application of the Ohio statutes to Respondent, as a facility-based long distance carrier, is reasonable. The statutory scheme in effect for the tax year 1987 recognized the importance of personal property taxes for local governing entities, especially school districts. Any change to this scheme will have devastating results for local governments and school districts. Local governments and

school districts will find it increasingly difficult to prepare budgets in reliance upon the unknown quantity of personal property taxes to be apportioned to the individual district. So long as these taxing entities are reliant upon personal property taxes to the degree they presently rely upon them, any change to the scheme outside the full consideration of the legislative process poses potentially insurmountable difficulties for these entities both in planning to meet and in meeting their public obligations.

The Ohio court below employed an erroneous analysis in reaching its decision. The court failed to consider whether there was any rational basis for the classification of facility-based carriers, it failed to give deference to the classification created by the legislative process in the State, and it failed to consider whether Respondent had suffered any discrimination in fact. As a result of the erroneous application of constitutional principles, *amici* and all similarly situated political subdivisions and school districts will suffer catastrophic financial consequences that will have far-reaching effects throughout Ohio. For these reasons, *amici* respectfully urge this Court to grant the petition for certiorari requested by Petitioner.

Respectfully submitted,

MARK A. ENGEL
(Counsel of Record)
SYLVIA LYNN GILLIS
BRICKER & ECKLER
100 South Third Street
Columbus, OH 43215
(614) 227-2300
Counsel for Amici Curiae

July 7, 1994

(5)

Supreme Court, U.S.
FILED
AUG 29 1994
CLERK

No. 93-1974

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,
Respondent.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

LEE FISHER
Ohio Attorney General

JAMES C. SAUER
(Counsel of Record)
BARTON A. HUBBARD
Assistant Attorneys General
RICHARD A. CORDRAY
State Solicitor
SIMON B. KARAS
Deputy Chief Counsel
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
(614) 466-5967

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

Page

REPLY BRIEF 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Allied Stores of Ohio, Inc. v. Bowers,
358 U.S. 522 (1959) 6, 8

American Sugar Refining Co. v. Louisiana,
179 U.S. 89 (1900) 4

Boston Real Estate Bd. v. Department of Pub. Utils.,
136 N.E.2d 243 (Mass. 1956) 5

Bosworth v. Pledger, 810 S.W.2d 918 (Ark.),
cert. denied, 112 S. Ct. 617 (1991) 6, 8

C. Thomas Stores Sales System v. Spaeth,
297 N.W. 9 (Minn. 1941) 6, 8

Capitol Cablevision Corp. v. Hardesty,
285 S.E.2d 412 (W.Va. 1981) 7

Charleston Fed. Savings & Loan Ass'n v. Alderson,
324 U.S. 182 (1945) 3, 8

Chesterfield Cablevision v. County of Chesterfield,
401 S.E.2d 678 (Va. 1991) 7

GTE Sprint Communications Corp. v. Wisconsin Bell, Inc., 454 N.W.2d 797 (Wis.1990) 7

Nordlinger v. Hahn, 112 S. Ct. 2326 (1992) 6, 8

TABLE OF AUTHORITIES (cont'd.)

Cases **Page**

Pacific Express Co. v. Siebert,
142 U.S. 339 (1892) 3, 4, 5

Snowden v. Hughes, 321 U.S. 1 (1943) 9

State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 363 S.E.2d 73 (N.C. App. 1987) 2, 6

No. 93-1974

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,
Petitioner,
v.
MCI TELECOMMUNICATIONS CORPORATION,
Respondent.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, the Tax Commissioner of Ohio, submits this reply brief in order to address several points raised in Respondent's Brief in Opposition, as follows:

1. Respondent initially seeks to dismiss the importance of this appeal by misstating the critical issue here. Respondent suggests that this case involves the imposition of different taxes on essentially the same business entities. *See* Resp. 1-2, 5-6, 9-12. This suggestion is neither factually correct nor accurate as a description of the central issue before this Court. Instead, the issue here is whether it is constitutional for the State of Ohio to tax telephone companies that are "facility-based carriers" in a distinct category from mere "resellers" of telecommunications services. *See* Pet. 4-5, 14-16.

Respondent is a "facility-based carrier," which is engaged in the business of transmitting long-distance telephonic messages by operation of its own integrated system of transmission equipment, circuits, and switches. Respondent thus holds and uses substantial property within the State of Ohio in order to provide the service to its customers of sending such messages across intervening space from a point of origination to a point of termination. Pet. A-54 to A-56. Respondent and all other facility-based carriers thus sell this service either directly to the public or to a "reseller." A "reseller" acts as a simple middleman, which sells to the public without itself performing any service and, significantly, without owning or operating any system of transmission equipment or holding and using any such property within the State.[1] The "middleman" nature of mere resellers has been distinguished from the distinct business conducted by facility-based carriers in Ohio, *see id.*, and elsewhere. *See, State ex rel. Utils. Comm'n. v. Southern Bell Tel. & Tel. Co.*, 363 S.E. 2d 73, 78 (N.C. App. 1987) (recognizing the distinction, as well as the continually changing nature of the developing telecommunications industry).

---

[1] Contrary to Respondent's suggestion, *see* Resp. 2, any property held and used by a reseller is fundamentally different from the extensive property held and used by a facility-based carrier. Resellers do not own, lease, operate, or pay tax on an integrated system of transmission equipment, which is precisely what qualifies a facility-based carrier as a "telephone company" subject to the public utility property tax. *See* Pet. A-54 to A-56. Although resellers may operate some minor pieces of switching equipment in accessing the transmission network of a facility-based carrier, such equipment is at most an incidental part of the "actual transmission facilities" held and used by a telephone company. *Id.* A-35 to A-36.

2. The authority of the States to exercise their essential taxing power by basing legitimate tax classifications on these substantial business differences between a "reseller" and a "facility-based carrier" is the true issue in this appeal. In its decision below, the Ohio Supreme Court held that a company which produces the product or performs the service it sells (*e.g.*, a "facility-based carrier") may not be classified separately from a company whose business is limited to buying and reselling such product or service (*e.g.*, "resellers"). Pet. A-12.[2] That holding is in error, and Respondent does not effectively negate this Court's established line of cases holding that this precise tax classification does *not* violate the Equal Protection Clause.

This Court has long held that the Equal Protection Clause does not prohibit differential taxation of companies that perform or provide a service directly to the public, as opposed to mere resellers of any such service.

As early as *Pacific Express Co. v. Siebert*, 142 U.S. 339 (1892), this Court rejected an equal protection challenge to a tax statute that distinguished between railroad and

---

[2] Respondent's contention that the Ohio Supreme Court's ruling was based on the fact that two facility-based carriers (Allnet and Cable & Wireless) had avoided assessment as telephone companies, even though they may have been similarly situated as to Respondent, *see* Resp. 6, 14-15, is a pure smoke screen. Any such avoidance of tax was due to those companies' apparent failure to file proper returns as telephone companies and a possible error in the audit of the general property tax returns that they did file. *See* R. 278. The irrelevance of this point is shown, however, by the fact that even the Ohio Supreme Court did not view this possible error as reflective of any intentional or systematic discrimination. *Cf. Charleston Fed. Savings & Loan Ass'n v. Alderson*, 324 U.S. 182 (1945) (same).

steamboat companies, which performed transportation services for sale to the public, and express companies, which acted as mere resellers by purchasing such transportation services from the railroad and steamboat companies for resale to their own customers. This Court approved the tax classification applied by the State to distinguish between those two lines of business, holding that "[t]heir different nature, character, and means of doing business justify the discrimination in this respect which the legislature has seen fit to impose." *Id.* at 354. The constitutional validity of such tax classification has thus been well established for decades. *See also, American Sugar Refining Co. v. Louisiana*, 179 U.S. 89 (1900) (Equal Protection Clause is not violated by a state statute that imposed a license tax on middlemen who bought sugar to refine for sale to the public, but exempted persons who produced the sugar which they refined and sold).

Respondent's discussion of these cases acknowledges the force of the principle this Court applied. It concedes that the middlemen and producers in question were engaged in "wholly different" businesses. Resp. 13. Respondent attempts to ignore this principle, however, by focusing on irrelevant incidentals of each such classification, suggesting, for example, that this case has nothing to do with railroads or sugar production. *Id.* Respondent is finally content simply to assert that the present case does not involve different businesses. This assertion directly contradicts Respondent's admission that the middlemen and producers in question in *Pacific Express* and *American Sugar* were engaged in "wholly different" businesses. Moreover, this assertion fails to explain why the well established principle of constitutional law, which concededly allows States to distinguish for tax purposes between middlemen and

producers, should be ignored.

In fact, this principle cannot and should not be so casually cast aside, for this Court has explicitly held that it is constitutionally permissible for States to recognize the "essential difference" between mere resellers and "other companies that own their own means of" producing the service in question. *Siebert*, 142 U.S. at 353. That is the exact distinction that the State of Ohio has employed for purposes of the *ad valorem* property tax, to distinguish between resellers of long-distance telecommunications services and facility-based carriers who provide such service.

3. The decision below is thus out of step with this Court's longstanding precedents applying the Equal Protection Clause to such state tax classifications. It also conflicts with decisions which other state courts have rendered. Contrary to Respondent's characterization of such cases as inapplicable, *see* Resp. 13 n.12, courts in other states have repeatedly recognized that the distinction between the producer or performer of a good or service and one who merely buys and resells the good or service is a valid basis for the State to classify the businesses differently for purposes of taxation. *See* Pet. 19-22 (discussing cases). Without reiterating this discussion from the Petition, it is significant that Respondent acknowledges that various state courts have upheld the constitutionality of tax classifications based on this distinction. Respondent's purported answer, however, is to again point to other peripheral, and legally irrelevant, distinctions between the cases, such as that the Massachusetts Supreme Court's decision involved electrical services and the Minnesota Supreme Court's decision involved chain store merchants. Resp. 13 n.12 (citing *Boston Real Estate Bd. v. Department of Pub. Utils.*, 136

N.E.2d 243 (Mass. 1956), and *C. Thomas Stores Sales System v. Spaeth*, 297 N.W. 9 (Minn. 1941)). Again, such trivial "distinctions" are without legal significance and have no force to sweep aside the longstanding principles of constitutional law the state courts have applied in following this Court's own controlling decisions.

In addition, Respondent does not satisfactorily elude the consequences of more recent decisions such as *Bosworth v. Pledger*, 810 S.W.2d 918 (Ark.), *cert. denied*, 112 S. Ct. 617 (1991), and *State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co.*, 363 S.E.2d 73 (N.C. App. 1987), by disregarding the purposes for which these cases were relied upon by Petitioner. Indeed, Respondent has completely avoided the point of the citations. Namely, the Arkansas Supreme Court's properly deferential approach to an equal protection challenge to a state tax classification of telephone services in *Bosworth* could not more starkly contrast with the erroneous approach adopted by the Ohio Supreme Court below in this case. *See, e.g., id.* at 922 (noting "wide latitude" afforded to States in upholding a tax classification between "WATS" line services and other long distance telephone transmission services where "there is any conceivable set of facts to uphold the law's rational basis"). The two approaches are frankly irreconcilable, and only *Bosworth* can be squared with this Court's precedents. *See, e.g., Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959); *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992).

Moreover, *Southern Bell* expressly recognizes that "facility operating companies" and "resellers" represent different "categories" of the larger class of interexchange companies, each with its own "distinctive characteristics." 363 S.E.2d at 78. The *Southern Bell* court's recognition of

these fundamental differences refutes Respondent's repeated assertion that the two kinds of businesses are one and the same -- the sole basis on which Respondent has sought to distinguish the settled case law upholding distinctions between producers and resellers for state tax purposes. *See also, Chesterfield Cablevision v. County of Chesterfield*, 401 S.E.2d 678 (Va. 1991) (recognizing and upholding against equal protection challenge the distinction drawn between broadcast stations, which produce programs themselves and broadcast them to the public, and cable television companies, which simply receive and retransmit such broadcasts to the public); *Capitol Cablevision Corp. v. Hardesty*, 285 S.E.2d 412, 420 (W.Va. 1981)(same)[3].

4. The basic error that pervades the decision below, and that renders it in conflict with this Court's decisions and those of other state courts, is the Ohio Supreme Court's refusal to defer to a rational legislative tax classification and, in particular, its refusal even to consider several rational bases that were put forward to support this tax classification. Those justifications -- chief among which is the time-honored distinction between producers and resellers -- have already been noted. *See* Pet. 14-16.

---

[3] Respondent's contention, *see* Resp. 14, that *GTE Sprint Communications Corp. v. Wisconsin Bell, Inc.*, 454 N.W.2d 797 (Wis. 1990), is consistent with this Court's equal protection analysis is plainly erroneous. Not only is that case inapplicable because it involved a different tax (sales) with a different object (transactions), it failed even to attempt to inquire whether any conceivable basis existed for distinguishing between "facility-based carriers" and "resellers." The case, therefore, underscores the breadth of the problem facing States in the taxation of the telecommunications industry and the need for this Court to reiterate the well-established principle of wide deference to legitimate legislative tax classifications in this area also.

Respondent's lone counter is to claim that these justifications are not adequately supported by the record, Resp. 11-12. The record refutes such claim and this would have become evident had the Ohio Supreme Court made the necessary inquiry. Its failure to undertake this inquiry was an even more fundamental error, for under this Court's decisions, the proper judicial approach to state tax classifications is to determine whether *any conceivable rational basis exists* to support the classification. *See, e.g., Allied Stores*, 358 U.S. at 526-29; *Nordlinger*, 112 S. Ct. at 2332-34; *Bosworth*, 810 S.W.2d at 922. No such analysis occurred here.

Instead, the court below was apparently persuaded that, because this tax classification differed from the state's treatment of such entities for the manifestly distinct purposes of public utility regulation under the State's separate police power, it should therefore be presumed invalid. *See* Pet. 6-7. Such a rationale completely misapplies the applicable precedents under the Equal Protection Clause. *See, e.g., Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 191 (1945); *C. Thomas Stores*, 297 N.W. at 18.

This misapplication of constitutional law was compounded by the court's willingness merely to assume that resellers existed that owned property within the State of Ohio and that had been treated differently from Respondent. Pet. 16-18. On the contrary, the only fact cited by Respondent in support of its allegation of actual discriminatory treatment was that two facility-based carriers -- Allnet and Cable & Wireless -- had apparently filed incorrect returns that had not been detected in the audits performed to date. The possibility of such administrative error, which was candidly acknowledged by the Tax Commissioner, R. 278, constitutes

the sole basis for Respondent's core claim that it was being taxed at a 100% rate while similarly situated companies were being taxed at a 31% rate. It is clear, however, that any such unequal application of the tax statutes would not deny equal protection of the laws, unless an intentional or invidious discrimination were shown, *see, e.g., Snowden v. Hughes*, 321 U.S. 1, 8 (1943). None was shown or found in this case.

5. In conclusion, Petitioner again urges the Court to recognize the critical nature of this issue both to the State of Ohio and to the essential taxing power of all state governments. In this particular case, it is estimated that more than $200,000,000 in taxes and interest will have to be refunded if this decision is allowed to stand. Most of these refunds would come directly from the budgets of Ohio's public schools. *See* Pet. 9 n.2. The decision below also is certain to have ramifications that go well beyond the State's ability to classify taxpayers within the telecommunications industry. As described above, the principles at issue here directly affect not only all regulated industries, but all industries that include distinct producers and resellers. The Ohio Supreme Court's decision thus threatens to establish a precedent that would severely inhibit the legitimate exercise of legislative discretion to draw rational tax classifications.

Perhaps most significant is the intractable problem of federalism created by the decision below. The Ohio Supreme Court has rendered a decision that disables the state taxing authority as a matter of federal constitutional law. Unless this Court intervenes by granting a writ of certiorari, that discordant interpretation of the Equal Protection Clause will be cemented as a lasting limitation on Ohio's ability to fund services through such tax classifications. The state

government has available no means of redress other than this opportunity for appeal to this Court.

CONCLUSION

For these reasons, as well as those presented at more length in the initial petition, the Ohio Tax Commissioner respectfully requests that the petition for a writ of certiorari be granted in this case to review the decision of the Ohio Supreme Court.

Respectfully submitted,

LEE FISHER
Ohio Attorney General

JAMES C. SAUER
(Counsel of Record)
BARTON A. HUBBARD
Assistant Attorneys General
RICHARD A. CORDRAY
State Solicitor
SIMON B. KARAS
Deputy Chief Counsel
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
(614) 466-5967

COUNSEL FOR PETITIONER